ELEMENTS

OF

HINDU LAW;

REFERABLE TO

BRITISH JUDICATURE

IN

INDIA.

By SIR THOMAS STRANGE,

LATE CHIEF JUSTICE OF MADRAS.

IN TWO VOLUMES:

VOL. I.

Omnes, suis legibus et judiciis usæ, αὐτονομίαν adeptæ, revirescunt.
Cic Ep. ad Attic. c. vi. ep. 11.

Let him (the king) establish the laws of the conquered nation, as declared in their books. Menu, ch. vii. v. 203.

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TO

THE KING.

SIRE,

Filling successively at Madras, by the appointment of His late MAJESTY, your MAJESTY'S revered Father, the offices of Recorder, and Chief Justice, the attention of the author of the following pages was, from an early period, called to the Law of the Hindus; the Elements of which, in parts of it referable to British judicature in India, are now presented to your MAJESTY,—of all law, operating within your widely extended Empire, the Constitutional Depositary, and Guardian.

Accept, then, SIRE, his dutiful thanks, for your gracious permission, thus to lay at your

Royal Feet, this latest result of his professional labours; regarding, as they do, an important portion of your distant subjects.

Your MAJESTY's known goodness of heart will incline you to take a particular concern in the laws of a people, remarkable for having, in all time, looked, with a kind of innate reverence, to the character and person of a KING. To this disposition in your MAJESTY, the appeal will not have been made in vain, on behalf of millions upon millions, spread over vast provinces of the East;—by nature a gentle, and historically an interesting race, gratefully acknowledging your mild empire; and, in return for obedience, supplicating only, together with protection, the preservation to them of their Institutions, (however superstitiously deduced,) —subject to as little change, as may be consistent with its stability.

Compiled partly with this view, which nothing is likely so essentially to promote, as your

MAJESTY's Gracious Patronage, the work,—the employment of that leisure, which, since his retirement from office, the author owes to the Royal Bounty,—is now, with all deference, inscribed to your MAJESTY, by

SIRE,

Your MAJESTY'S

Devoted and faithful

Subject and Servant,

THOMAS ANDREW STRANGE.

Bath, August 27, 1825.

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PREFACE.

THE following work originates in the possession of a mass of opinions, upon points of Hindu law, delivered by their Pandits, on references by the courts dispersed in the territories dependant on the government of Madras. They were, at the desire of the author, transmitted to him for his information, from time to time, by various Company's judges, through a period of several years, during which he exercised the judicial office under the Royal Charter at that Presidency; and, having been subsequently seen, and commented upon by Mr. Colebrooke, and, in some instances, by Mr. Sutherland of Bengal, as well as by the late Mr. Ellis of Madras, their respective "Remarks," obtained upon, and annexed to them, seemed to render them documents of too great value, not to be turned, in some way or other, to public account; more especially considering how little was known of Hindu law at the time, in that part of India. At first, and during the author's continuance in India, nothing was in contemplation, beyond a selection of the papers alluded to, under some convenient arrangement. But, subsequent to his quitting it, and return to Europe, the possession of leisure, with the desire to be useful, gradually suggested a compilation, that might more effectually

facilitate to all, having occasion to become acquainted with it, a connected knowledge of the law in question, to the extent of its use in the British courts established in India, whether under the direct authority of the king, or that of the East India Company. Thus, what had been at first, not the principal only, but the sole intention, namely, to give publicity to what he so possessed, became in the end a subordinate one, as connected with the more extended idea, subsequently adopted. With this view, he proceeded, at his earliest convenience, to resume for the purpose his study of the Institutes of Menu, in the translation of Sir William Jones; that of the two treatises on Inheritance, translated and illustrated by Mr. Colebrooke; in addition to which, he was fortunate enough to obtain in time the more recent tracts on Adoption, prepared, after the manner of Mr. Colebrooke, by his nephew, Mr. Sutherland; with a compendium of the law of inheritance, of some celebrity, translated by Mr. Wynch, also of the Bengal service. To these were added the work in every British Hindu jurist's hand, known familiarly by the name of Mr. Colebrooke's Digest; together with the Reports, through a succession of years, commencing previous to 1805, in the Sudder Dewanny Adawlut of Bengal.

The sources then of the following pages are, in general, First, The printed works on Hindu law, accessible to the English reader; compared with,—Secondly, The MS. papers, of which some account has been given. It will be the business of this Preface to enlarge a little upon what has been already stated; intermixing briefly such

notices as the subject may suggest, drawn principally from other MSS. in his possession;—the chief of those exhibiting statements and opinions, prevalent in Southern India, having been left by the late lamented Mr. Ellis of Madras, and recently transmitted to the author, by common friends of his, and of the deceased, at that Presidency.

I. The general body of ceremonial and religious observances, of moral duties, and of municipal law, constituting, in its most comprehensive sense, the Dharma Sastra of the Hindus, and derived, as will be seen in a succinct and masterly paper on the subject subjoined to this volume,(1) consists, 1. Of their *Smritis*, or text-books; each in structure, and most in doctrine, the same with that of Menu;—attributed to authors, of whom scarcely any thing is known;—in many instances, not even their names, the assumed ones being fictitious. These are each divided into three *Candas*, or sections;—the *Achara Canda*, relating to ceremonies; the *Vyavahara*, to law; and the *Prayaschit*, to expiation. With the first and last *Candas* of these works, the following one has nothing to do.—2. Of *Glosses* and *Commentaries* on the text-books; —and, 3. Of *Digests*, comprehending either the whole system of jurisprudence, or relating only to particular titles of law. Of the latter, the Digest, translated by Mr. Colebrooke, is an instance; embracing, as it does, only eight, out of the eighteen, acknowledged standing titles; and referable principally, as it professes to be, to the subject of Contracts and Succ[illegible]

(1) Letter A. post, p. 3[illegible]

1. Of the *Text-books*, varying in number, according to different authorities, from eighteen to thirty-six, and more,(1) the little that is known, in point of history, will be found in the successive Prefaces, by Mr. Colebrooke, to his translations of the Digest, and two treatises on Inheritance; in the latter of which, in particular, their respective value is accurately weighed and ascertained. By *Parasara*, author of one of these books, (referring to the Hindu division of the world into four ages,) are assigned, as appropriate to the *Crita Yuga*, or first age, the Institutes of *Menu;* to the *Trita*, or second, the ordinances of *Gautama;* to the *Dwapara*, or third, *Sancha* and *Lichita;* and, to the *Cali*, or fourth, (the present sinful age, as it is deemed,) his (*Parasara's*) own ordinances. A text-book of authority, written for, and known to be applicable to the present age, could not but be of peculiar value; but, it having been observed, that these text-books consist each of three distinct parts, it happens that, in *Parasara's*, the second, or *Vyavahara Canda*, (which must have comprised his legal Institutes,) is entirely wanting: so that a professed commentary on this Smriti, that will be more particularly noticed, founds itself, in this respect, upon nothing belonging exclusively to *Parasara*, beyond a verse extracted from the *Achara*, or first *Canda*, purporting merely, "that the

(1) See Preface to Digest, p. xiii. et seq. The following list is according to Yajnyawalcya.—Menu; Atri; Vishnu; Harita; Yajnyawalcya; Ushanas; Angiras; Yama; Apastamba; Sanverta; Catyayana; Vrihaspati; Parasara; Vyasa; Sancha and Lichita, (who were brothers, and wrote each a Smriti separately, and another jointly: the three being since considered as one work); Dacsha; Gautama; Satatapa; and Vasishta. Parasara, whose name appears in the above list, enumerates also twenty other authors; but, instead of Sanverta, Vrihaspati, and Vyasa, he gives the names of Cashyapa, Bhrigu, and Prachetas.

" princes of the earth are in this age enjoined to conform " to the dictates of justice." It is the opinion of the Southern jurists, and for this they sometimes cite *Vrihaspati*,(1) that *text-books* are not of themselves authority; and that the only final authority in Hindu law is to be sought, in these later times, in the conclusions and decisions of the authors of the several Digests and Commentaries, according to the schools, to which they respectively belonged;— that the former are of importance in the schools, where law is taught; but, abstractedly, of little in courts, where it is practised. On this ground, for want of an extended commentary upon them, (the glosses of *Culluca* and others being considered as explanatory only of the text,) the Institutes of *Menu*, though the undoubted foundation of all Hindu law, are looked upon by them as a work to be respected, rather than, in modern times, to be implicitly followed.

2, 3. *Commentaries*, and *Digests*. These also are numerous: their number proceeding in part from the circumstance, that every succeeding dynasty in India did, at its commencement, produce, as the rule of its government, a new Commentary on, or a new Digest of, the ancient text-books; the authority of which may be supposed to have declined locally, with the declining power of the dynasty, under which they originated. These likewise have been noticed in the Prefaces that have been alluded to; nor is it probable, that much that is material can be added to what Mr. Colebrooke has there said of them, whether as regard-

(1) 2 Dig. 128.

ing their history, or their merits. To the English student, the *Daya Bhaga* of *Jimuta Vahana*, and the *Mitacshara* of *Vijnyaneswara*, (treatises on Inheritance,) are of peculiar importance;—as having been translated and illustrated by one, so competent as the person who undertook, and performed, as he did, that meritorious labour;—the one, the standard of law in Bengal; the other, received throughout the whole range from Benares, to the southernmost extremity of the peninsula. The authority of these, within their respective limits, is demonstrated, by their having been so selected, as the best guides for our Courts, throughout the British dominions in India. They are hence continually referred to in the following work; a great proportion of which concerns inheritance, according to the enlarged acceptation of that term among Hindu jurists. The like observation applies to the translation, by Mr. Wynch, of the *Daya Crama Sangraha*, of *Sricrishna Tercalancara*, a compendium of the same subject, noticed by Mr. Colebrooke as "good;"(1) and, in an eminent degree, to those by Mr. Sutherland, of the *Dattaca Mimansa*, of *Nanda Pandita*, and the *Dattaca Chandrica* of *Devanda Bhatta*,—the standard treatises on the law of adoption;—of the former of which, previous to its translation, much use had already been made by Mr. Colebrooke, in his notes on the chapter of the *Mitacshara*, upon this important branch of Hindu law.

To these brief notices may with propriety be added a few, applicable to the same class of works, *not translated*, that are, next to the *Mitaçshara* of *Vijnyaneswara*, of para-

(1) Preface to the Treatises on the Hindu Law of Inheritance, p. vi.

mount authority in the territories dependant on the government of Madras. These are the *Smriti Chandrica*, the *Madhavya*, and the *Saraswati Vilasa*.

Of the author of the *Smriti Chandrica*, named Devanda Bhatta, little, if any thing, seems to be known. The work, attributed to him, was compiled during the existence of the *Vidyanagara* dominion, (an extensive Southern empire, that flourished during the thirteenth, fourteenth, and fifteenth centuries of our era;) but apparently not under the direct sanction of the government. It has been considered by Mr. Colebrooke, to be a work of uncommon excellence, if not superior, in extent of research, and copiousness of disquisition, to the *Madhavya;* though he would not venture to say, upon his own opinion, which would prevail where they might be found to differ. And Mr. Ellis regarded it as highly valuable, for the complete information it affords, of the constitution of the several sorts of judicial tribunals, that existed in Southern India, at the time when it was composed;(1)—and useful for practical purposes, as affording precedents for the forms of processes, deeds, &c.; —as well as for the clearness, with which points of law in it are discussed.

With regard to the *Madhavya*, compiled for the Canarese dominions, by *Vidyaranyaswami*, the eminently learned minister of the founder of *Vidyanagara;* who, living in the fourteenth century, may be considered to have been, as it were, the lawgiver of the last Hindu dynasty:—of

(1) See letter B. at the end of the volume, p. 319.

the first and third *Candas* of this celebrated work, to which the author gave the name of his brother *Madhava Acharya*, the basis is the text of *Parasara;* but, as has been already explained, having, for the second, nothing of that Smriti's to proceed upon, it became in fact though not in name, a general Digest of all the legal authorities prevalent at the time in his part of India. However this may detract in some degree from its effect, as being bottomed in truth upon no particular text, the general fame of the author is so great, resting, as it does, not upon this work alone, but, upon others also, particularly on his Commentary upon the four Vedas,—that, among his more intense admirers, he is held to have been an incarnation of Siva; and the work in question has, at all events, the advantage of being later in time than that of the *Smriti Chandrica*, upon the basis of which it has been thought by Mr. Colebrooke to have been evidently formed.

Somewhere about the twelfth century of our era, the princes of the *Cacatya* family, establishing themselves to the north of the Crishna, built Annumconda, or Orugallee, usually written *Warankul*, where they fixed their seat of government; which, extending itself by conquest, became the second great empire to the Southward; the first having preceded it about four centuries, while the third was that of *Vidyanagara*, already noticed. This second, comprehending, as it does, the territories now belonging to Hyderabad, the northern Circars, a considerable portion of the Carnatic, and, generally speaking, the whole of the countries, of which the Tailanga is at present the spoken

language,—the *Saraswati Vilasa*, a general Digest, attributed to *Prataparudra-déva-Maha Raja*, one of the above-mentioned princes, (but probably composed only under his direction,) became the standard law-book of his dominions; in which, (says Mr. Ellis,) the influence of its alleged regal origin, and the introduction of new notions, referable, as has been thought, to the progress of the Mahomedan invasions, extending themselves about that time in a southerly direction, is very apparent. For the first time in India, the will of the prince is in it declared paramount to the right of the subject; and the claim, on the part of the ruling power, to the absolute property in the soil, on which the modern revenue system of that country is founded, is here advanced. It continues to be a book of some authority to the northward of the Pennar, where many customs exist, particularly respecting the tenure of land, that are derived from it; yet, even here, within its proper limits, it is in a great measure supplanted by that of the Commentary of *Vijnyaneswara*, the prevailing authority in Southern India.

To conclude this brief account of Hindu law-books, with some notice of the *Digest*, that is in familiar use;—which, originating in the suggestion of Sir William Jones, was compiled by *Jagannatha Tercapunchanana*, (a learned Pandit,) and translated from the Sanscrit by Mr. Colebrooke;—it consists, like the Roman Digest, of texts, collected from works of authority, extant in the Sanscrit language only, having the names of their several authors prefixed, together with an ample commentary by

the compiler, founded for the most part upon former ones. That its arrangement was not, on its first appearance, satisfactory to the learned, and that the Commentary abounds with frivolous disquisitions, as well as with the discordant opinions of different schools, not always sufficiently distinguished, rests upon the best authority, that of the learned translator; by whom, its utility, for the purpose for which it was planned, is well nigh disclaimed.(1) It is long, therefore, since it was characterized, not unhappily, as "the best law-book for a "counsel, and the worst for a judge." And, as its doctrines, taken commonly from the Bengal school, and originating sometimes with the compiler, differ often from the authorities prevalent in the South of India, it had become matter of regret with the author of the Prefaces referred to below, adverting to the frequent use made of it by the Southern Pandits, on references to them by the Courts, "that they should have been thus "furnished with the means of adopting in their answers, "whatever opinion may happen to be best accommo- "dated to any bias they may have contracted;" while he could not but deprecate its tendency to supersede, in the Peninsula, the works of "the much abler authors of the Mi- "tacshara, the Smriti Chandrica, and the Madhavya."(2) But, in whatever degree Jagannatha's Digest may have fallen in estimation, as a book to be used with advantage in our Courts, and especially in those to the Southward, it

(1) See preface by Mr. Colebrooke to his translation of Jagannatha's Digest, p. xi.; and more particularly that to his translation of the two treatises on Inheritance, p. ii.

(2) Append. vol. ii. p. 150.

remains a mine of juridical learning, throwing light upon every question on which it treats, whatever attention it may require in extracting it. In the course of the present work, proportional care has been exerted, in comparing passages apparently contradictory, or incongruous, (well known to exist upon almost every point of Hindu law,) as well as in drawing from the whole, after reference to other available information, the probable practical result;—to which are usually subjoined such citations, as seemed the best calculated to promote inquiry, if not to remove doubt. Such has been the use made of the *compiler's* part of the work; while the more frequent references are to the *texts;* for the greater part of which, by all unacquainted with the Sanscrit, resort hitherto can only be had with advantage to this Digest.

Among the reported decisions in the Sudder Dewanny Adawlut of Bengal, comprising cases of Mahomedan, as well as of Hindu law, deducting from the latter such as turn upon particular circumstances, or as proceed upon equitable principles, there are not many that establish any general rule. The few, however, of this description, being of the highest authority, are noted and respected accordingly in the ensuing work.

II. With regard to the *MS. materials*, valuable, as exhibiting the living law upon subjects of daily occurrence, they form, with other documents, an Appendix, constituting the second volume. They consist chiefly of the "Opinions" of Pandits, with "Remarks" upon them;

distinguished by the letters C. E. and S.; as denoting respectively the names of Mr. Colebrooke, Mr. Ellis, and Mr. Sutherland.

To have published these opinions, with the references preceding them, in the state in which they were communicated, would have been attended with the effect, not only of extending this work in point of bulk, but with that also of loading its pages with much superfluous matter. The *references*, therefore, have been divested of their more formal parts, and, in some instances, the statement of facts has been shortened. With the *opinions*, desultory and redundant as they continually are, beyond what could well be imagined, by any one not conversant with the manner of the Hindus, greater liberty has been taken. Such being the Eastern style, from which the very oracles of their law are not free, the endeavour has been, in arranging what they have said, to render them clear, in as few words as possible, using the utmost care to extract and exhibit their meaning. Sometimes scarcely meeting the question, they more frequently travel beyond it. In the latter instances, retrenchment has been employed; and, in order to attain coherence, passages have been occasionally transposed. Where irrelevant matter has been retained, it has been for the sake of some peculiarity connected with it in Hindu manners, or customs; and if, in some cases, opinions, palpably erroneous, have been admitted, it has been with a view to the corrections they have received, in the subjoined "Remarks." Thus dealt with, the papers alluded to will scarcely be recognized as

the same, by those from whom the communication was derived; yet, if compared with the originals, it will be found, that the substance and effect of them has been preserved. But, were it otherwise, it would be comparatively of little consequence,—the value of the collection, as here exhibited, consisting principally in the "Remarks" with which it is accompanied. For, with regard to the Pandits, considering the infancy of the judicial establishment, provided for the dependancies on the Madras government, at the time when the collection was made, the authority of many cannot be looked upon as very great. The most competent (it may be presumed) were appointed. But, in that part of India, and at the time in question, little, if any encouragement, having been begun to be given to the cultivation of learning among the natives, the field for selection could not be ample. Allowance is also to be made for the possibility of corruption in particular instances, remembering always the declaration of Sir William Jones, "that he could not, with an easy conscience, con-"cur in a decision, merely on the written opinion of native "lawyers, in any case in which they could have the "remotest interest in misleading the Court;"(1)—a reflection, considering the quarter from whence it came, that has long rendered desirable a work of the kind now attempted; as calculated, according to its execution, to enable the British Courts, administering the law in question, to check the propensity thus imputed to the native lawyer, as well as to obviate, in other respects, his casual deficiencies.

(1) See preface to Mr. Colebrooke's translatio[illegible]

Of the "Remarks" that have been alluded to, the principal, in number and value, are Mr. Colebrooke's;—conveying, in most instances, not only his strictures on the points referred, and opinions reported, but references also to printed authorities, in support of his observations, or of the answer of the Pandit. They were, without any previous, personal acquaintance, through the medium of a common friend, solicited at an early period, with a view to individual satisfaction only,—not to publication; and, immersed as Mr. Colebrooke was at the time, in official duties of the highest importance, they were returned from Calcutta with a readiness, a frequency, and a liberality as to the use to be made of them, that, under circumstances at all alike, cannot often have been paralleled, and can never have been surpassed. Such comity casts a lustre about learning, that doubles its merit. Of the magnitude of the service thus rendered,—to every one in the slightest degree occupied in Hindu jurisprudence, it must be sufficient to have said of the "Remarks" to which it applies, that they are Mr. Colebrooke's.

Of Mr. Ellis, late of the Madras Civil Service, who kindly supplied the series next to be noticed, it is necessary to say more, in proportion as he is less known. Alluded to in terms of respect by the author of the History of Mysoor,(1) he never attained the rank of an authority, having died prematurely of poison, administered to him a few years ago, through mistake, by a native servant.

(1) Preface, p. xvi.

But the offices he successively held, attaching to him the attendance of the most intelligent Hindus, through their aid, and his own indefatigable industry, he succeeded in rendering himself a considerable master of their learning, and particularly of their law; a science, for which he may be said to have had a natural genius. Accordingly, the opinions in question, regarding, as they did, the customs, practices, course, and law of Southern India, and the judgments in the suits in which they had been given not having been communicated, it became convenient to submit them to the examination of Mr. Ellis,—by consent of all who knew him, the best acquainted at the time with the subject, in that part of our Indian possessions. A long intimacy with him rendered such a reference easy; nor did he disappoint the expectation with which it was made, though accepted under circumstances of some disadvantage. His "Remarks" were all penned by him during an excursion on the river Hoogly, without the benefit of books; which will account for their being, in few instances, accompanied, like Mr. Colebrooke's, with a citation of authorities. And here it may be noticed, that, where dissent is expressed by him, it has regard, not to the corresponding "Remark" of Mr. Colebrooke, but to the opinion of the Pandit, Mr. Ellis never having seen Mr. Colebrooke's "Remarks;" and that where the effect of any of Mr. Ellis's has been simply that of coincidence with Mr. Colebrooke, Mr. Ellis's has been suppressed, Mr. Colebrooke's not being considered as requiring confirmation.

The only remaining observations of the kind, to be specially distinguished, are those of Mr. Sutherland of Bengal, the nephew of Mr. Colebrooke; a Sanscrit scholar, and an eminent Hindu lawyer; of which the notes and accompaniments to his translation of the *Dattaca Mimansa*, and *Dattaca Chandrica*, afford abundant proof. The author has not the pleasure of his personal acquaintance; but he has, in correspondence, experienced from him all his kinsman's liberality; while his "Remarks" annexed to some of the "Opinions," shew, in conjunction with his published work, that it is not in that estimable quality alone that he resembles him, but in learning and judgment also; leaving one to regret in them only, that they are so few.

With all his opportunities, and much as the author's occasions had led him to cultivate them, yet, unacquainted with the Sanscrit language, in which (to use the expression of Sir William Jones,(1)) "the Hindu laws are for the "most part locked up," great would have been his presumption, in offering to others, in any form, his ideas on the subject, had he not first taken the most effectual means in his power, of bringing them to some practicable test. For this purpose, unable to reach the *fountains*, it became him at least, toward correction and verification, to avail himself of what he conceived to be the safest, and best *channels*. The work brought to a close, according to his then existing means, he, in the summer of 1823, printed a few

(1) Preface to translation of the Digest, p. vi.

copies, the greater part of which he forwarded (interleaved) for examination, to friends at the several Presidencies of Bengal, Madras, and Bombay; with an earnest solicitation for criticism, and every species of remark, calculated to render it not unworthy its purpose. This has retarded the publication, without having, in the degree that was expected, answered the purpose for which the transmission was made;—the author having received, in this long interval, no return from Bengal, and one communication only from Bombay. But the delay is not to be regretted; since it has afforded him ample time for revision, which he hopes has been employed in improvement, from sources of his own; while it has not been unproductive, as to its direct object. To the present Chief Justice of Bengal,(1) (at the time one of the puisne justices of the Supreme Court at Madras,) he is, in consequence of the measure that was pursued by him, indebted for some valuable suggestions as to the arrangement, and some useful remarks on the details of the work. The late Chief Justice of Madras,(2) in returning the copy that was placed in his hands, in addition to remarks, such as might be expected from his high legal character and station, accompanied it with notes of cases in Hindu law, determined in the Court in which he was presiding, since the time when the author quitted India. And to William Oliver, Esq. and John Fryer Thomas, Esq. both of the Madras Civil Service, and to Charles Norris, Esq. of Bombay, all three holding with credit offices in the judicial department of

(1) The Honourable Sir Charles Grey.

(2) The Honourable Sir Edmund Stanley

their respective Presidencies, he is under infinite obligations for suggestions and corrections; every one of which, he believes he may venture to say, he has adopted.

With all the advantages that have been thus acknowledged, confident that a work of the kind cannot be expected to arrive at attainable perfection, without the combined aid of many lights, the author takes his leave for the present,—with the hope that these may still be afforded him, beyond what he has already received;—prompted herein by the same zeal, in the prosecution of a public object, that first stimulated the undertaking, and has since maintained in him the perseverance, with which it has been so far performed.

BATH, AUG. 1825.

IN THE FOLLOWING WORK,

the Digest referred to, thus, *Dig.*, is Mr. COLEBROOKE's translation of Jagannatha's; Lond. ed. 8vo. 1801.

The initials, *C. E.* and *S.*, annexed to the references to the Appendix, denote respectively the names of Mr. COLEBROOKE, the late Mr. ELLIS of Madras, and Mr. SUTHERLAND of Bengal.

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INTRODUCTION.

It is proposed in the following work to exhibit an outline of Hindu law, so far as it is in use in the Courts erected, whether at the Presidencies, or in the Provinces, for administering justice to the Hindu subject of British India. In developing the design, it will be convenient, first, to specify the parts of that law, which do not enter into it; and then to sketch out the arrangement, that has been adopted for carrying it into effect.

1. The government of India, so far as that country has been reduced to our power, resting, as it does, upon British institutions, upon instructions from the authorities at home, or upon the laws of England, as administered under Charters, founded upon Acts of Parliament, with a partial reference only to Native Codes, such portions of these latter as explain and enforce what we consider to be objects of *constitutional* law, can never come into discussion in any of the above courts. Public office of every description in British India is held exclusively by British, with the exception of some subordinate ones; in the discharge of which latter, the Native, having entered into our service, is answerable to us, and to be judged of, like our

selves, not by his own, but by our law.(1) This observation excludes from our view farther, in a treatise like the present, professedly limited, the wide field of all that belongs to persons standing in a *public* relation; comprised, in part, with reference to the Hindus, in the seventh chapter of the Institutes of Menu. Upon a distinct ground, we have nothing to do with their *penal enactments;* which, it is probable, have been thought to be capricious, or cruel, in too many instances, to be fit to be adopted, as the measure of retributive justice, in the King's Courts, even as against the Hindu himself, whose ordinances they are. They are minutely detailed by Menu; who sums up all, by exalting to "the mansion "of Sacra, that king, in whose realm lives no thief, "no adulterer, no defamer, no man guilty of atrocious "violence, and no committer of assaults." (2)

Neu quis fur esset, neu latro, neu quis adulter.

In the Company's Courts, as dispersed over the interior, (those dependant on the government of Bombay excepted,) the Mahomedan penal law, modified in particulars, has been substituted for that of the Hindus;—with what propriety this is not the place to inquire. Under the Presidency of Bombay, Hindus and Mahomedans are tried according to their respective codes, accommodated in a certain degree to British ideas; while

(1) Vencata Runga Pillay *v.* East India Company, Notes of Cases at Madras, vol. i. p. 174. 203

(2) Menu, ch. VIII. v. 386.

the Parsees at the same Presidency are subject in criminal, as well as in civil cases, to the English law. The *practice* also of Courts, as regarding the forms of action, and modes of proceeding, together with what appertains to their jurisdiction, is foreign to this work;—the end of which is, to ascertain and elucidate such doctrines of the law in question, as apply to the subjects of suits instituted in the English Courts with reference to it; not to point out how they are to be framed and conducted. And the same may be said of the *canons of evidence*, and rules for determining the *competency of witnesses*;(1) upon both which, as upon the matters last before alluded to, the Hindu law is copious and minute; and, it may be added, in general, sensible. But, its provisions in these respects are, in the Courts of the King, superseded by his instructions, as conveyed in the Royal Charters; and, in those of the Company, by the Regulations under which they act. At the same time, it is to be observed, that important questions sometimes arise out of the adaptation of English process to suits between Natives; and rigour, bordering upon injustice, would be but too often the consequence of adhering strictly to forms of our own, not consonant to their feelings and usages; to obviate and provide against which is, from time to time, the province of our Courts, exercising therein a sound and careful discretion; and this, in instances of frequent recurrence, by rules expressly framed

(1) Menu, ch. VIII. v. 61, et seq.
Syed Ally *v.* Syed Kullee Mulla Khan; Notes of Cases at Madras, vol. ii. p. 160.

and promulgated for the purpose; it being the evident intention of the "Charters" and "Regulations" alluded to, that where the Native alone is concerned, the attainment of substantial justice should be rendered easy to him; and this, as far as practicable, according to the means that would be adopted, had the suit been brought in a Native Court.

Constitutional law, then, criminal law, with the law defining and distinguishing different courts, and detailing their practice, and manner of proceeding, not entering into the scope of the following pages, what remains in effect to be expounded in them, as concerning the Hindus, is the strictly civil part of their code only, as referable to the enjoyment and transfer of property, with some incidental notice of the rights and condition of the different members of families;—to the course in which *Inheritances* descend, and are divided;—to the criterion by which *Contracts* become such, and according to which they are either enforced, or annulled.

2. So much having been premised, it is obvious that some account of *property* in general, as it exists, and is regarded among the people in question, will form the first subject of inquiry; since every other title of law to be examined is, more or less, connected with it; while a just comprehension of most of them must depend upon their ideas respecting property being previously understood: and that the next will be *marriage*,—that institution, whence a well-known writer notices Plato to have "with great "judgment directed his legislator to take his stand;"(1) and

(1) Taylor on Civil Law, p 264.

on which, combined with that of *property*, as constituting together the foundations upon which rest the whole order of civil life, a living one, and eminent jurist, has disserted with a wisdom altogether worthy the subject, and expatiated with a splendour of eloquence, that Plato's self, —had England, instead of Greece, been his country,—had not disdained to own.(1) In the chapter that treats of it will be seen what importance is attached by the Hindus to the second in order of these institutions, particularly with a view to male issue; upon the existence of which their imaginary happiness so essentially depends. But the united pair may fail to be parents;—a contingency inherent in too many of their marriages, in which the age of the man is often not only out of all proportion to that of the bride, but excessive for the primary purpose of the union. This consideration, taking also into account the indispensableness of a son, to perform obsequies, and discharge his ancestor's debts, has led to the expedient of *adoption*; which will therefore follow, properly enough, the title of *marriage*, on the supposition of the latter having been unproductive of male issue. And, by one or other of these means, a family being fully constituted, the *paternal relation* next challenges attention; to which belongs the power and obligations of the father, with the condition, not of his children alone, but of other collateral and subordinate connexions; including the state of *Sla-*

(1) "Discourse on the Study of the Law of Nature and Nations," by Sir James Macintosh; an exquisite tract, which it is to be feared has become scarce. See p. 40, et seq. See also "Sketch of the Inter-National Policy of Modern Europe, &c." by the Hon. Frederick Eden, p. 25.—with Dr. Croke's Introductory Essay, p. 4, to his Report of the case of Horner *v.* Liddiard.

very. In investigating this, the *paternal relation*, a proceeding very peculiar to this people presents itself to the inquirer; namely, the *partition* of the father's property in his life, whether with his consent, or by operation of law. These titles disposed of, and supposing the Hindu in question to have retained during his life the dominion of his property, as most frequentlyhappens,—howit *descends*, and, in the event of a plurality of sons, is *distributed*, with the *disqualification* of heirs, and the *charges* to which those who succeed are liable,—these are all topics composing together the Hindu idea of INHERITANCE; being one of the two great subjects of Hindu law, (that of CONTRACT being the other,) which the Charters of justice have judiciously reserved, in extending, so far as they do extend, the authority of the English law over the Native; imposing it upon the Courts so erected, in administering these subjects, to adjudicate upon them, not, as in other cases, according to that law, but according to the law of the parties, as they may happen to be, Mahomedan, or Hindu. The death of its head giving rise to a new family, perhaps to several, the course that has been sketched returns upon us, in other marriages, with similar consequences attending them; so that the plan of what is proposed to be here discussed is brought nigh to a close. It remains, however, to notice the condition of *widowhood;* which, remarkable as it is, among the Hindus, constitutes an appropriate feature in their law, demanding to be distinctly considered. Nor can the *Testamentary power* be with propriety passed over in silence, established as it is at one of our Presidencies, and

in exercise at the others; though unknown to the Hindu, prior to the intercourse of Britain with India.

Thus has the natural history of a Hindu family, through the changes and contingencies that may happen to it, in its progress, from its origin in marriage, to its absorption, as it were, into a new one, by the death of its head, suggested the arrangement of a work, comprehending a succinct view of nearly whatever may be practically useful to be referred to in Hindu law, as it exists to be dispensed by us, whether at the different Presidencies under the Royal Charters, or in the Courts established in the Provinces, by the authority, and subject to the regulations of the British organ for India, the United East India Company.

With regard to CONTRACT, it forms a separate subject, distinct from any of those, of which the order has been unfolded. Considering how much the resolution of every question of the kind depends in all countries upon the dictates of reason and good sense, rather than (as in cases of inheritance) upon conventional rules, deduced often from localities, as they respect religion, manners, and habits, and resting for their efficacy upon authority—the *peculiarities* of this part of the law will, in the discussion of the title last alluded to, be alone selected and stated. Consonant to this enumeration, and arrangement of subjects, the whole will be comprehended under the following chapters, viz.:—I. On Property in general. II. On Marriage. III. On Adoption. IV. On the Paternal Relation. V. The same subject continued. VI. On Slavery. VII. On Inheritance of Property held in severalty. VIII. On Inheritance of Property held in Coparcenary.

IX. On Exclusion from; and X. On Charges upon the Inheritance. XI. On Widowhood. XII. On the Testamentary Power. XIII. On Contracts.

If others have had to vindicate themselves from the presumption of attempting tasks, in which they have been ably preceded, the present is an instance, where one of considerable difficulty and nicety, as well as of importance, has been ventured upon without a guide. No work of the kind existing in the English language, of the utility of such a one, according to the merit of its execution, little doubt can be entertained; adverting especially to the more modern materials, upon which it is in part founded.(1) For the undertaking, the author is not without a becoming consciousness, how greatly it will stand in need of apology; and this not the less, if he have been so ill advised, as to have been throwing away his labour on an unworthy subject. Howsoever it may have been disesteemed by some, it is sufficient surely to entitle it to attention, that it is the law, by which are to be regulated the civil interests of the Hindu population of so extensive a portion of the Empire, as India embraces. In preserving it, so far as Britain has done, to the millions who claim the benefit of it as their inheritance, she has conformed to the wisdom of experience, and the dictates of humanity; considerations, (it is not irrelevant to remark,) that appear to have had their influence with this very people themselves, as referable to others, from the earliest period of their legislation. Speaking of the king having effected a recent

(1) See Preface, p. xix.

conquest, "Let him (says Menu) establish the laws of the "conquered nation, as declared in their books." (1) And, while such shall continue to be our policy, it must follow that every attempt to facilitate a knowledge of them, among those by whose instrumentality they are to be administered, must be in itself laudable. It is the duty, as well as interest of Britain, to foster those, whom it has become the unworthy fashion to abuse, and undervalue. It were at least a more magnanimous course, *parcere subjectis*. Nor can it be a commendable one, in any point of view, to irritate, by insulting them. It is true, that works calculated to produce this effect, are not very likely to find their way to Hindu understandings. But they influence but too often the creed of those, by whom Hindus are to be governed; and our tenure of India will be but little strengthened, by the conqueror, in the persons of the Company's writers and cadets, being taught to contemplate the conquered with horror, and to look down upon them with contempt.

(1) Menu, ch. VII. v. 203.

ELEMENTS

OF

HINDU LAW.

CHAP. I.

ON PROPERTY.

EVERY disquisition on the origin of property, among a people with whose early history we are unacquainted, must needs be conjectural; and, as such, misplaced in a work, which, in its nature, excludes fancy. What the state of it was anciently in India, able inquirers have been divided in shewing.(1) Till lately, the prevailing opinion was, that the right to the soil was in the sovereign; a persuasion, that has been elaborately combated, in an incidental chapter of a comparatively recent history, of deserved celebrity.(2) The general idea of property comprehending, as it does, personal, as well as real, moveables, with that which is immoveable,—in most civilized countries, the land for obvious reasons, takes the lead, in

(1) Grant.—Rouse.—Plans for Government of British India.

(2) "Historical Sketches of the South of India," by Lieut.-Col. Mark Wilks, ch. V. See also Observations on the Mim[illegible] Mr. Colebrooke, quoted in Mr. Tucker's Financial Statement, 1824, p. 117.

point of importance.(1) It is peculiarly so with the Hindus, who may be regarded as having been in all time an agricultural, rather than a commercial, or manufacturing people. It is, with them, the fund that is principally looked to for the maintenance of families :(2) and to which, in different provinces, and under successive despotisms, they are recorded to have clung to the last, as long as the exactions of power left to them (wherever they did leave) any thing, that could be called a proprietor's share.

In the Bengal provinces, where the Mahomedans, by the time that the English began to supersede them, had long ruled with unlimited, and unrelenting sway, the right of the Hindu in land was no longer to be traced; and he had degenerated into a mere cultivator, liable to have his share of the produce continually reduced, and varied. Such as it was, the right of cultivation was descendible; affirming for the government, and denying to the inhabitants, every thing like property in the soil. Nor was there wanting (as it would seem) authority in the Shasters, for a condition of things so abhorrent from natural right.(3) In a part of the Digest, purporting to be a disquisition on property in the soil, and founded on an ancient text, it is, in effect, all vested in the sovereign; leaving to the people only an annual, defeasible interest,(4) subject to constant diminution, at the will of the ruling power. So convenient a doctrine, uniformly

(1) Blackstone's Comm. vol. ii. p 384. 12th edit.

(2) Bhowannychurn Bunhoojea v The heirs of Ramkaunt Bunhoojea; Beng. Rep 1816 p. 565, et seq

(3) 1 Blackst. Comm p. 138. Id. vol ii. p. 2. edit. 12.

(4) 1 Dig 460

maintained by the government that preceded ours, was, upon our acquisition of territory in India, long acted upon by ours, following implicitly what appeared to be the law of the country; till, impressed with its perniciousness, as tending, by the extinction of property, to discourage improvement, the Bengal government, under the administration of Lord Cornwallis, so far restored the subject's right, as to fix, professedly for ever, payable in money, the proportion to which the state should be entitled; leaving to the possessor of the land, after this deduction, the benefit of progressive improvement, with an unrestrained power of alienation, to be regulated only by the native law.

In the provinces to the South, the Mahomedan invasion had been comparatively recent, and partial; and, in this proportion, private property in land was found to be there not only more perfect, but more prevalent. That it existed by the Hindu law, as once in force, is now (it is believed) no longer doubted.(1) Among the various speculations as to its commencement, none can be more rational than the position laid down by Menu, that "cultivated land is the property of him who cut away "the wood, or who cleared and tilled it;" (2)—of the produce of which the ordinary proportion accruing to the sovereign was a sixth; and, in times of urgent dis-

(1) Menu, ch. IX. 52, 53. Id. VIII 239. 243.
1 Dig. 471. 473.
Doe on d. Mootoopermall and others v. Tondaven and others; Notes of Cases at Madras, vol. i. p. 494.
See also references (2) Ante, p. 11.

(2) Menu, ch. IX. 44.

tress, a fourth. (1) Beside this, unless where land was allotted to them from the corporate stock, parts of the produce of each proprietor was, and continues to this day, to be distributable, to the officers and artisans,—to the twelve *Ayangadees*, (as they are called,) administering the justice, preserving the peace, managing the concerns, and supplying the wants, or contributing to the convenience of every town or village; of the aggregate of which, well described, as it has been, as a mass of little republics, India is constituted.

But though as, with reference to the sovereign, it may be no longer contended, that the subject in India is altogether dependant in respect to land, nevertheless, in estimating right by the power that a man has of disposing of what he possesses, whether by act to take effect in his life, or by will that operates not till after his possession has ceased, the principle that seems to pervade the Hindu law is, that all property is held in trust, not for the exigencies of the state merely, but for those of a man's family; insomuch that proprietary right cannot be said to be inherent in a Hindu, but with considerable limitation and exception. (2) In discussing it with reference to him, it is necessary to advert, not only to the different *kinds* of property, recognised by the law in question, but to the *state* also, or condition of the owner, as the head of a family, or otherwise. The property of a Hindu may have descended to him in a course of inheritance, or have been

(1) Menu, ch. VII. 131, 132. Id. VIII. 304. 308. Id. X. 118. 2 Dig. 168.

(2) Bhowanychurn Bunhoojea v. The heirs of Ramkaunt Bunhoojea; Bengal Rep. 1816. p. 569.

of his own acquisition;—ancestral, or self-acquired;—and it will, in either case, as with us, be distinguishable into real and personal, moveable and immoveable: real, or immoveable property, according to their law, including, beside land and houses, slaves attached to the land; (1) and Corodies, or annuities secured upon it; (2) a species of property bearing a close resemblance to that designated in the English law by the same term, and enumerated by it among incorporeal hereditaments. But, between the Hindu and our own, there is, in respect to property, this material difference; that whereas, while, by ours, *land* descends to the heir at law, the *personal goods* of a deceased vest in executors or administrators, distributable among the next of kin;—by the Hindu law, *real* and *personal* are alike descendible to the same persons, and subject to the same incumbrances; as will be more particularly seen in the chapters on inheritance, and the charges to which it is liable. (3) But, though real and personal property so far class together, and are not distinguishable, great importance (as has been already stated) is attached by it to land, in which in particular the sons are considered as possessing a special interest; (4)—having, with their father, by birth, according to the doctrine of the Mitacshara, prevalent in the Peninsula, and north of India, so far a co-ordinate right in that part of it, which is ancestral, that, if he thinks proper to come to a partition in his lifetime, (a disposition

(1) 2 Dig. 114. 141.
(2) Jim. Vah. ch II. 9. 13, 14. 25.
(3) Post, ch. VII. VIII. and X.
(4) 2 Dig. 113, 141. 3 Id. 51. 434.

of property, the particulars of which will be seen in a subsequent chapter,(1)) he must divide it as directed by law; that is, give them and himself equal shares:—nor is it in his power to aliene any considerable portion of it without their concurrence. (2) It is according to the doctrine of this school, like dignities with us, inherent in the blood; and therefore, so far as regards the interest of parceners, unalienable. The Bengal school follows the same rule with respect to partition; but admits to the father otherwise an unreserved power of alienation over all that he possesses, however, in particular instances, the exercise of it may be liable to censure. (3) To recur to the distinctions between the different kinds of property:—if any, lost in the time of the ancestor, be recovered by his successor, it is no longer regarded as ancestral, but classes as acquired; (4) while what has been acquired, through the use of the patrimony, is considered as ancestral. (5) And here it may be observed, that as the people are divided into Castes, appropriate modes of acquiring property are assigned to each; but they are little regarded in practice, not being liable to be enforced by law. (6)—With regard to the *state* of the owner, the law, in its provisions for the disposal of property, almost constantly contemplates him as the

(1) Ch. V. p. 105.
(2) Mit. on Inh. ch. I. sect. i. 27. Id. sect. v. 9, 10.
(3) Jim. Vah. ch. II. 30.
(4) Menu, ch. IX. 209.
Jim. Vah. ch. II. 21. Id. ch. VI. sect. ii. 31.
(5) Jim. Vah. ch. II. 21. Id. ch. VI. sect. i. 33. and sect. ii. 31.
(6) Menu, ch. X. 116, 117. 47, et seq.
2 Dig. 135, et seq.—Post, 301. 308.

head of a family. To one not so, restrictions upon alienation do not in general apply. Property belonging to a single man, not shared by a coparcener, may be enjoyed and disposed of by him, as he pleases; remoter heirs not being, in this respect, objects of legal care. His entire alienation of it, without consulting any one, being "the act of a person who is his own master, is valid."(1) Only, even with reference to one thus isolated, what he does not dispose of in his lifetime, must be left to descend in a course of inheritance; the right of aliening (with very little exception) being confined to acts to take effect in the life of the grantor;—the Hindu law knowing no such instrument as a *will*.(2) Thus it stands in general with respect to an owner, being a single man. But, with the Hindu, the idea of property to any amount being hardly separable from that of family, the head of one is not, properly speaking, "his own master;" but a trustee, more or less, for numerous interests, which the Shaster has shewn great anxiety in protecting. And, as it is said by us, that the law, in any particular, may be proved by the *forms of pleading*, so may the true inference, as to the law of landed property, in this respect, among the Hindus, be deduced from the form prescribed for a *grant;* purporting, as it does, to reserve what may be necessary for the subsistence of the grantor's family;(3)—to which Catyayana adds, besides, his dwell-

(1) 2 Dig. 156.
(2) Note to 2 Dig. 316.
Post, ch. XII.
(3) 2 Dig. 162.

ing-house.(1) The restriction, as it respects the maintenance of a man's family, is against the alienation of the *whole* of his estate,(2) (meaning *land*,) not of a small part, no way affecting its support;(3) and, if there be no land, nor property of that description, the reason applying, it extends to jewels, or similar valuables.(4) It may be remarked here, that the attempt is treated as a symptom of insanity, and void upon that ground;(5) which was precisely the insinuation of the Roman law, in the case of an inofficious testament. To this principle, of protection against the act of the father and husband, is perhaps to be ascribed the circumstance, that, in the case of land, the Hindu law contemplates *gifts* only: as if there never could be danger of a man's *giving*, to an extent to leave his family destitute; insomuch that, whatever be the nature of the conveyance intended, the form should be that of a gift, with the ceremonies of donation;(6) authenticated with the greatest publicity, for the sake of certainty as to boundary, and as a secu-

(1) 2 Dig. 133. Yajnyawalcya, 3 Id. 5.
(2) Jim. Vah. ch. II. 23.
Nareda, 2 Dig. 97. 113. 141.
Vrihaspati, Id. 98.
Catyayana, Id. 105. 133.
Dacsha, Id. 110.
Misra, Id. 111.
Beng. Rep. 1816. p. 566, et seq.
Append. p. 1.—C.
(3) Jim. Vah. ch. II. 24.
(4) Sricrishna, note to Jim. Vah. ch. II. 26.
(5) 2 Dig. 118.
(6) 3 Dig. 432. and note.
Note to Jim. Vah. ch. I. 22.
Append. p. 3.—C.
Sham. Sing v. M. Umraotee; Beng. Rep. 1813. p. 395.

rity against future disputes; the law requiring the writing for the purpose (though a deed is not indispensable) to be attested by witnesses, in the presence of neighbours and kindred, *with the assent of parties interested*, and under the sanction of a public officer.(1) Not that property in land cannot be legally divested and transferred by *sale*, as well as by *gift*; the former (says Jagannatha) occurring constantly in practice.(2) The concurrence of sons in the alienation by the father of land, however derived, as required by the Mitacshara, is dispensed with, where they happen to be all minors at the time, and the transaction has reference to some distress, under which the family labours, or some pious work to be performed, which the other members of it, equally with the father, are concerned should not be delayed. Such are the consecration of sacrificial fires, funeral repasts, rites on the birth of children, and other prescribed ceremonies; not to be performed without an expense, in which the Hindus are but too apt to indulge, on such occasions, to excess.(3) Urged by any such consideration, and the sons at the time incompetent to judge, their concurrence may be assumed; and the father will be justified in acting without it, to the extent that the case may require.(4) And, even of *moveables*, that have *descended*, such as precious stones, pearls, clothes, ornaments, or other like effects, any alienation, to the prejudice of

(1) 2 Dig. 161.
(2) 3 Dig. 432.
(3) Mit. on Inh. ch. I. sect. i. 29.
2 Dig. 118.
(4) Mit. on Inh. ch. I. sect. i. 28, 29.

heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his; and he has independant power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty, and purposes warranted by texts of law;(1) while the disposal of the *land*, whencesoever derived, must be in general subject to their control; thus, in effect, leaving him unqualified dominion only over *personalty acquired.*(2) Whereas, in the Bengal provinces, following the tenets of a different school, the power of the father over his property is less restrained, requiring for its alienation the concurrence of his sons, only in the instance of *land inherited.*(3) And, even with regard to this, though a father in Bengal should aliene the whole of his property without it, the act is in law valid, under a distinction peculiar to it in that part of India, maintaining the legal validity of acts, however militating with the intention and policy of the law.(4) Wherever there exists no issue male, nor adopted son, as substitute for it, he appears to be nowhere under any restriction, excepting that of not leaving his family destitute; and, even with regard to this obligation, whether it be according to the Bengal school

(1) Mit. on Inh. ch. I. sect. 1. 27.

(2) Append. p. 5.—C.

(3) Note to Jim. Vah. ch. II. 31.
Append. from p. 6 to 14.

(4) Jim. Vah. ch. II. 27, et seq.
Prannath Das *v.* Callishunder; Beng. Rep. ante 1805. p. 51.
Qu. tamen, and see case of Bhowannychurn Bunhoojea *v.* The heirs of Ramkaunt Bunhoojea, Beng. Rep. 1816. p. 564.

more than a moral one, seems to be a question. Whatever may be thought of these clogs on alienation, in a country highly commercial like our own,—founded, as they are, upon the benevolent principle of providing for those, in whose favour every man contracts a debt, upon becoming the head of a family,—in this view, they are not unfit to be enforced; and, though experience in England may have led there to the gradual removal of all restrictions of the kind, let it not be forgotten by the readers of the "Commentaries," that, by its ancient law, not only could the feud "not be transferred from one feudatory "to another, without the consent of the lord," but that even, with it, it could not be aliened, "unless the owner "had also obtained the consent of his own next apparent, "or presumptive heir;" insomuch, (adds their learned author,) that "it was usual, in ancient feoffments, to "express that the alienation was made by consent of "the heirs of the feoffor, or sometimes for the heir ap-"parent himself to join with the feoffor in the grant;"(1) —precisely as has been seen to be the course by the Hindu law. Nor does the analogy of these prohibitions stop here, as we learn from their relaxation in our own country; by which a man was, in progress of time, allowed to sell and dispose of lands that had been *purchased* by him; over which "he was thought to "have a more extensive power, than over what had "been *transmitted* in a course of descent from his "ancestors;" but the law still did not authorize

(1) 2 Blackst. Comm p. 287. 12th edit. 8vo.

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him "to sell the *whole*, even of his own *acquire-* "*ments*, so as totally to disinherit his children," any more than it permitted him, of his own mere will and power, to aliene his *paternal* estate at all. (1) Nor perhaps, for the sake of illustration, will it be digressing too much, to advert here to the correspondent doctrine of the *civil* law; in the eye of which (it may be remembered) the father and son, (and, failing him, the grandson by representation,) were so far looked upon as one person, that the son was scarcely regarded as succeeding to the inheritance on the death of the father, being, by a fiction of law, rather considered to have been in possession before;—distinctions, and fictions, that might almost be thought to have been derived originally from the Hindu law; such a resemblance is there between it, and these European codes, ancient and modern, in these particulars. There is an equally strong one between it and them, in the incapacity of aliening, arising from personal causes, whether physical or moral; the Hindu law providing that, to be capable, a person must be not only *sui juris*, with reference to idiotcy, lunacy, infancy, or minority, imbecility resulting from age or disease, and duress, with the state of slavery, and degradation, (the latter answering, in some sort, to attainder with us,)—but he must have, at the time, a clear conception of what he is about; the law under consideration manifesting, indeed, in this respect, a care beyond other codes, by extending it to cases where the

(1) 2 Blackst. Comm. p. 288.

party undertaking to dispose of his interests happens at the time to be intoxicated, or to be acting under the influence of some over-ruling passion, as well as to the ordinary ones of mistake, or imposition.(1) Hence the distinction that has been alluded to, as prevalent in the Bengal school, between the act of a person under any of the enumerated disabilities, which is void, and that of one of sound mind, not impelled by passion; which latter, however censurable it may be, as being prohibited, will be nevertheless valid, (2) upon the principle of *factum est quod fieri non debuit;* or, as this class of lawyers themselves express it, that "a fact cannot "be altered by a hundred texts;" (3)—a doctrine, of which no trace is to be found in the Benares school, in the Mitacshara, the Smriti Chandrica, or the Madhavya,—all in full force in the Peninsula;—the author of the Smriti Chandrica, on the contrary, maintaining, that what has been unduly given must be considered as not given, and that the restoration of property, held under a prohibited gift, should be enforced by the ruling power. (4) And, even in Bengal, (as al-

(1) Menu, ch. VIII. 163.
Nareda, 2 Dig. 181. 187. 193. Yajnyawalcya, Id. 193.
Catyayana and Vrihaspati, Id. 197.
Bhowannychurn Bunhoojea *v.* The heirs of Ramkaunt Bunhoojea; Beng. Rep. 1816. p. 564.
Append. p. 11.—C.

(2) Jim. Vah. ch. II. 28, 29.
2 Dig. 105. 113. 117. 159. 201.
3 Dig. 37, et seq.
Append. to ch. XII. p. 419, et seq.

(3) Jim. Vah. ch. II. 30, and note to § 31.

(4) Mohun Lal Khan *v.* Rance Siroumunnee; Beng. Rep. 1812. p. 352.
Letter from Mr. Colebrooke, dated Dec. 3, 1812. Append. to chap. XII. p. 420.

ready intimated), inconsistent as it may seem, if a Hindu father propose to make a *partition* of *heritage* in his lifetime, he can, by this means, divide his property only among his sons, and according to certain prescribed rules,(1) said not to have been hitherto weakened by any express decision; (2) such being the effect of the acknowledged interest that sons have in the possessions of their parent, which it never was the intention of the law should be wantonly, or arbitrarily violated. Whereas, if he think proper to proceed by way of *gift*, embracing, as this does, distinct from partition, every species of conveyance and charge, under the construction put upon it, that it is valid, however improper; and that, though the giver may be culpable, the title of the receiver is good, whoever he may be, and under whatever circumstances it may have been created, it being always understood that the giver was the owner of the property, under no personal disqualification or disability,—such being the reasoning, the father of a family there is thus at liberty to disappoint every expectation, however reasonably entertained, by either alienating his property from it altogether, or by substituting among its members, by this mode, a distribution wholly different from the one prescribed by the law; so as to have led to the observation, that "the Hindu legislators might have saved themselves the trouble of providing rules to regulate a

(1) Jim. Vah. ch. II. 50. 74. 76. 83.
3 Dig. 4.

(2) Letter from Mr. Colebrooke, dated July 22, 1812. Append. to ch. XII. p. 425. Vid. tamen his "Remark" on the case of Eschanchund Rai v. Eshorchund Rai, (the Nuddea case;) Beng. Rep. ante 1805. p. 3.

father's distribution, if the whole may be evaded by the easy expedient of calling it a *gift*, instead of a *partition*."(1)

Property, as hitherto spoken of, is supposed to be the man's. But the Hindu law assigns to the sex also, what is called emphatically *Stridhana*, or "woman's property:" the term being derived from *Sri*, female, and *dhana*, wealth;(2)—not that it means necessarily money; it may consist of any thing else of value, as of land;(3)—as it more usually does of jewels, or other ornaments. Though it be the sex's, it is with reference to wives, or widows, that the law concerning it comes most frequently in question; few women among the Hindus, from the time that they are marriageable, remaining single. To constitute it, it must have been the gift, not of a stranger, but of a husband, or some one or other of the owner's near relatives. If derived from a stranger, or earned by herself, in either of these cases, according to the most general understanding, not coming within any of the instances hereafter enumerated, it vests in the husband, if she have one, and is without reserve at his disposal.(4) Whereas the *Stridhana* of a married woman is hers; unless, according to the law as prevalent in Bengal, it consist of land,

(1) Append. to ch. XII. p. 425.—C.
Eschanchund Rai v. Eshorchund Rai; Beng. Rep. ante 1805 p. 2.
Ramcoomhar v. Kishercunder; Id 1812. p. 359.
But see since, Bhowannychurn Bunhoojea v. Ramkaunt Bunhoojea, Id. 1816 p. 516. 504, as referable to land.

(2) Mit. on Inh. ch II sect. u. 3.

(3) Append. p. 15.—C.

(4) Jim. Vah ch. IV. sect. i. 20.
Daya Crama Sangraha, ch. II. sect. ii. 25. 28, 29.
Catyayana, 3 Dig. 566.

given to her by her husband, of which the dominion remains with him;(1) and, howsoever derived, and of whatever quality, he has universally with her so far a concurrent power over it, that he may use it in any exigency, for which he has not otherwise the means of providing; andthis, without being accountable after, for what he may have so applied. The alleged occasions are, the preservation of the family during a famine, which may be construed to mean generally want; any distress, having the effect of preventing the performance of an indispensable, particularly of a religious duty; sickness; imprisonment; and even the distress of a son.(2) It would seem, however, that the right is personal in the husband; since it has been held, in the case of a writ of execution for a debt due by one, that the wife's *Stridhana* could not be seized under it;(3) though, had he been arrested, or taken, he might (*ex concessis*) have applied the ornaments upon her neck to its discharge, having no other means of extricating himself from legal custody. Nor is this all: for though, subject to the occasions that have been specified, the absoluteness of her right in the property in question is generally asserted,(4) it would seem to

(1) Jim. Vah. ch. IV. sect. i. 20.
Daya Cr. Sangraha, ch. II. sect. ii. 31.
Nareda, 3 Dig. 575.
Colebrooke (on Obligations), p. 28.
Append. p. 17.—S.

(2) Jim. Vah. ch. IV. sect. i. 24.
Mit. on Inh. ch. II. sect. xii. 31, et seq.
Daya Cr. Sangraha, ch. II. sect. 33, 34.
Devala and Yajnyawalcya, 3 Dig. 578.
Append. p. 18.—C.

(3) Append. p. 19.—C. and E.

(4) Jim. Vah. ch. IV. sect. i. 21.
Catyayana, 3 Dig. 574. Nareda, Id. 575.

follow, from the universal condition of Hindu females, uneducated, and thence liable to perversion and influence, that any gross abuse of it by her will be controlable by her father, while single, by her husband during coverture, and by her guardians after his death; such interference being itself subject to revision by the judicial power, since otherwise the idea of *Stridhana* would be but a mockery.(1) Of the property in question, it is most commonly said, with reference to the married, that there are six descriptions; (2) but the authorities do not concur as to the precise number; and a good deal of reasoning has been employed in discussing, without satisfactorily determining, whther this number, most generally adopted, is to be taken restrictively of a larger, or only as exceptive of a less.(3) The following enumeration, extracted principally from the Smriti Chandrica, comprehends nearly all that occur elsewhere, and more than are universally admitted, as will be noticed in specifying them; the specification being accompanied with such remarks, as the subject may seem to require, or may naturally suggest. 1. What is given to a young woman, or to her husband in trust for her, at the time of her marriage, that is, during the space from the beginning to the close of the nuptial ceremony, commencing with the oblation for increase of prosperity, and ending with a

(1) Nareda, 2 Dig. 584. Catyayana, 3 Id. 576. Id. 626.
(2) Menu, ch. IX. 194.
Jim. Vah. ch. IV. sect. i.
Mit. on Inh. ch. II. sect. xi.
3 Dig. 557.
(3) Jim. Vah. ch. IV. 1. 18. 3 Dig. 568.

return of the salutation; but not to be confined rigorously to the day, if given on account of the marriage.(1) 2. Her *fee;* or what is given to her in the bridal procession, upon the final ceremony, when the marriage, already contracted and solemnized, is about to be consummated, the bride having hitherto remained with her mother; as will appear in the next chapter. And the misery of Hindu marriages, at (on the part of the female) an immature, and often an inordinately disproportioned age, is sensibly shewn, by the present in question being said to be intended as a *bribe*, to induce her to repair the more cheerfully to the mansion of her lord.(2) It may be here remarked of this *domi-ductio*, this bringing of the bride home, which, with the Hindus, is a consequence only of the antecedent contract, that, among the Romans, it was an ingredient wanting to its completion; till when, the bride was "*sponsa*" only; becoming "*uxor*, statim atque "*ducta* est, quamvis nondum in cubiculum mariti vene-"rit." The *fee* of a Hindu wife has moreover this anomaly attending it, that, upon her death, it descends in a course of inheritance peculiar to itself.(3) 3. What is given to her on her arrival at her husband's house, when she makes prostration to her parents. 4. Gifts subsequent, by her parents, or brothers. 5. Upon her hus-

(1) 3 Dig. 610. 2 Id. 154.
Prankishen Sing v. Mt. Bagwhutee, and Bengal Rep. ante 1805. p. 3.
Post, p. 38.

(2) Jim. Vah. ch. IV. sect. i. v. Id. sect. iii. 21.
Mit. on Inh. ch. II. sect. xi. 5.
Daya Cr. Sangraha, ch. II. sect. ii. 8.
Vyasa, 3 Dig. 370.

(3) Post, p. 51, and 249.

band proposing to take another wife, the gratuity given by him to reconcile the first to the *supersession*, the measure of which seems not to be settled; (1) as will also be more particularly seen in the following chapter. 6. What a woman receives from the bridegroom, on the marriage of her daughter. 7. What she owes at any time to the good graces of her husband; as, for instance, a reward for performing well the business of the house in her department, called her *perquisite*. (2) 8. Any thing given her at any time by any of her relations, being specially given;—a description, sufficiently general to comprehend gifts so made to her before marriage, while yet an unbetrothed member of her own family; which are expressly included by various authorities. (3) 9. The earnings of her industry, as by sewing, spinning, painting, and the like. Such are the instances of *Stridhana*, specified in the Smriti Chandrica; upon the last of which it must be remarked, that it does not occur in the enumeration given in the Mitacshara, (4) any more than in Menu's; (5) while Jimuta Vahana, with others, exclude it, observing that, though the proceeds be hers, they do not constitute "woman's property," and that her husband has a right to them, independant of distress. (6) Yet, it seems admitted, that her heirs, and

(1) Mit. on Inh. ch. II. sect. xi. 30.
Daya Cr. Sangraha, ch. II. sect. ii. 15.
(2) Catyayana, 3 Dig. 563. 569.
(3) Jim. Vah. ch. IV. sect. i. 21. Id. sect. iii. 11, 12. 15.
Mit. on Inh. ch. II. sect. xi. 5.
(4) Mit. on Inh. ch. II. sect. xi.
(5) Menu, ch. IX. 194.
(6) Menu, ch. VIII. 416. Jim. Vah. ch. IV. sect. i. 20.
Catyayana, 3 Dig. 566.

not his, succeed to them after her death, she having survived him; (1) the reason for the doubt as to their constituting *Stridhana* being, that it is payment by strangers, not a gift from her husband, or any of her relations,—a circumstance belonging to the description of the property in question. (2) The same objection applies to, 10. What is given to a wife for sending, or to induce her to send her husband to perform particular work: which by some is included, (3) by others denied. (4) 11. Property, which a woman may have acquired by inheritance, purchase, or finding;—what has been inherited by her being so classed by Vijnyaneswara, whose authority prevails in the Peninsula; while it is otherwise considered by the writers of the Eastern school. (5) Lastly, 12. The savings of her maintenance. (6)—Dying, without leaving issue, the *Stridhana* of a married woman vests by descent in her husband, he surviving her. (7) The succession to her, she surviving him, will be found detailed in a subsequent chapter, on Widowhood. (8)

Of the property of *religious Institutions*, and of that partaking of *jura regalia*, something will be incidentally said in parts of this work, in which a reference to them connects with other subjects of discussion; (9) materials,

(1) 3 Dig. 472. 495, et seq. 3 Id. 628.
(2) Append. p. 21.
(3) Jim. Vah. ch. IV. sect. iii. 19, 20.
(4) 3 Dig. 568.
(5) Mit. on Inh. note to ch. II. sect. xi. 2. 3 Dig. 568. 627.
(6) Jim. Vah. ch. IV. sect. i. 15, and note. 3 Dig. 567.
(7) Post, ch. XI. p.
(8) Ch. XI. p. 248. Append.
(9) Post, p. 172. 185.

concerning them, that are accessible, being too scanty to admit of any extended investigation.

It remains to speak of *title*, which is not valid, unless there have been possession under it; for which purpose possession of a part is possession of the whole. (1) Nor can the want of it be accounted for on the ground of opposition by an adverse party,(2) the rule requiring, that there should be *juris et seisinæ conjunctio*, to make a completely legal one; it being laid down, that occupancy alone is not sufficient to constitute a right, without a title, and that the production of a title will not suffice, unsupported by occupancy; a right resulting only from the union of both.(3) But though simple occupancy, without a title, will not constitute a right, a title may be *inferred* from *possession*; which (to use the language of our own law, the doctrine of it and of the Hindu being in this respect substantially the same) "may, by length of time, and "negligence of him who has the right, ripen by degrees "into a pèrfect and indefeasible title." (4)—But, to be attended with this effect, the possession must have been that of a stranger, not that of one standing in certain degrees of relationship (*Sapinda*,(5) or *Saculya*) (6) to the rightful owner. (7) Nor even, in the case of a stranger, will it avail him, unless it have been maintained in the

(1) Yajnyawalcya, Beng. Rep. 1816. p. 554.
(2) Id. p. 552.
(3) Beng. Rep. 1816. p. 553.
(4) Blackst. Comm. vol. ii. p. 196. 12th edit.
(5) *Sapinda*, near kindred, offering the funeral cake to the same ancestor.
(6) *Saculya*, remote kindred.
(7) Vrihaspati, Beng. Rep. 1816. p. 557.

sight of the adverse party, without let or molestation on his part, he not having been under any disability to prevent his interference, and thereby obviate the conclusion of his having acquiesced; since, where neglect is not imputable, the title of a rightful owner retains its validity.(1) Possession, under the circumstances that have been stated, for ten years, if the property be of a personal nature, or for twenty, if it be real, extinguishes the right of the original owner, he having been, during the time, in a condition to vindicate it. Generally speaking, in case of dispute, a title must be proved by the original holder; but, if there have been a descent, the presumption of right is in favour of the heir, so as to cast upon the adverse party the burthen of disproving it; in which case also there is some analogy between the Hindu law, and our own; and, if the possession have continued for three generations, it cannot be disturbed. (2)

Of the three universally recognised natural rights, viz. the right of personal security, referable as well to the unmolested enjoyment, as to the preservation of life, the right of personal liberty, and the right of private property, it having been the policy of the British legislature, with regard to the two former, to leave the Native at our Presidencies to the protection of the English law, to be modified, in its application, by the discretion and wisdom of those intrusted to administer it, its benevolence

(1) Vyavahara Matrica; Beng. Rep. 1816. p. 557.
Vrihaspati. Id.

(2) Vyavahara Matrica; Beng. Rep. 1816. p. 553. 557.
Vid. tam. Append. p. 22.
Append. ch. XIII. p. 465.

has confirmed to him, with respect to the latter, the benefit of his own code and customs; by directing that his *inheritance and succession* to lands, rents, and goods, with all matters of *contract* between party and party, shall be determined by such laws and usages, as the same would have been determined by, had the suit been commenced in a Native Court. (1) Of these two great titles, property, that has been discussed, pervades both, with reference either to transmission, or exchange. And, as inheritance pre-supposes marriage, this, with some subordinate titles, springing out of it, will form the matter of the next, and some subsequent chapters. And, first, of marriage.

(1) See the Royal Charters.

CHAP. II.

ON MARRIAGE.

By no people is greater importance attached to marriage, than by the Hindus. It is, among them, with one sex, (the female,) indispensable. With the other, it constitutes the order of *Housekeeper, (Grihásta;)* the second, and most respectable of the four, by which, with them, the different periods of human life are distinguished. (1) It completes for the man the regenerating ceremonies, expiatory, as is believed, of the sinful taint that every child is supposed to contract in the parent's womb;(2) and being, for the Sudra, and for women, the only one that is allowed,(3) its obligatoriness is, as to the latter, among the ordinances of the Veda. (4)—Thus religion and law co-

(1) Menu, ch. IV. 1. VI. 89, 90. They are thus enumerated, 1. The religious student, (*Brahmachari,*) who has received investiture, and is in a course of pupillage. 2. The householder, (*Grihi,*) or married man. 3. The hermit, (*Vanaprasta.*) 4. The mendicant, ascetic, or anchoret, (*Bhikshu, Sanyasi,* or *Yati.*) Datt. Mim. p. 62, note 60. Menu, ch. VI. 1. 38, 39. 87. Dubois, on the people of India, part ii. ch. I. p. 91. 4to edit. The first stage may be prolonged through life, without passing into the order of housekeeper; whence there are three religious orders: the perpetual student, the hermit, and the anchoret.—C.

(2) These will be found enumerated under the following references, viz. Note to Mit. on Inh. ch. I. sect. vii. 3.—Note to Datt. Mim. sect. iv. 23.—Note to 3 Dig. 104. See also Id. p. 606.—Menu, ch. VI. 91.—Asiat. Res. vol. vii. p. 310.

(3) 3 Dig. 94. 2 Id. 391.
Note to Mit. on Inh. ch. I. sect. vii. 9.

(4) Menu, ch. II. 67.

operate with the climate in its favour. The consideration of it, regarded as the foundation of a family, of which the husband is the head, involves not only the reciprocal rights and duties of man and wife, but the derivative ones also of parent and child, guardian and ward. To select a suitable husband for his daughter, at an age when she can have but very imperfect ideas of the object, every Hindu father is expressly bound; which having been omitted to be done for three years, from the time that she becomes marriageable, she is at liberty to choose for herself;(1) the neglect however upon which this right depends being considered as attaching, only where the opportunity of matching her properly has existed, and been suffered to lapse;(2) which, in respectable families, never happens. The right so to dispose of her, in default of father, is in a succession of paternal relations, and finally in the mother.(3) If there be no one competent to the purpose, (a case that can rarely occur,) she is at her own disposal, as she has already been stated to be, where the providing a husband for her has been neglected by her family, longer than is justifiable. And, as to the proper time, according to Culluca Bhatta, the distinguished expositor of Menu,(4) it precedes puberty,(5)—Menu

(1) Menu, ch. IX. 4. 90.
The King v. Kistnama N.; Notes of Cases at Madras, vol. ii. p. 251.
(2) Menu, ch. IX. 89.
Jim. Vah. ch. XI. sect. xi. 6.
2 Dig. 491.
(3) Yajnyawalcya, 3 Dig. 106.
Append. p. 22.—C.
(4) Preface to translation of Menu, p. xiv.
(5) 2 Dig. 386, 387. 3 Id. 328.

having enjoined every man to give his daughter in marriage, though she have not attained the age of eight.(1) This is to be understood, however, of what is called the *betrothment*, leaving the girl under the care of her family, till her maturity admits of her husband claiming her; of which it is the province of the mother to give notice. Revolting as is the idea of an engagement of this nature being finally contracted thus early, it is not a little aggravated by the restriction imposed on virgin widows, not to marry again;(2) and which is never violated, without a loss of character. The betrothment, once effected, by the bride and bridegroom walking seven steps hand in hand, during a particular recital, the contract is complete upon their arriving at the seventh step, the texts alluded to having been pronounced;(3) though the period for what is vulgarly called the *second* marriage may be yet distant.(4) Previous, and up to betrothment, the affair rests legally in promise; which may be broken, subject to consequences, as the breach can, or cannot be justified. According to Hindu superstition, an agreement for the purpose would be lawfully determined, on the part of the man, by the occurrence of unfavourable auspices; such as a flight of birds, or the chirping of

(1) Menu, ch. IX. 88. 94. Jim. Vah. ch. I. 39.
(2) General note, end of translation of Menu, p. 364. Asiat. Res. vol. vii. p. 310. Post, p. 240.
(3) Menu, ch. III. 43. Ch. VIII. 227. Note to 2 Dig. 484. Culluca Bhatta, Id. 485. Yama, Id. 488.
(4) Menu, ch. IX. 47. Append. p. 25 to 29.—E. and C.

a lizard, in the one or the other direction, when seeking a prosperous hour for the wedding;(1) and a variety of causes are enumerated, warranting, as they respectively apply, retraction on either side: (2) but, where the attempt to withdraw is without excuse, performance of the engagement may be enforced, as it might have been with us, previous to our marriage act.(3) Such is the law; but, so obsolete is it in practice, that it may be considered as a dead letter, upon which no proceeding could be instituted at the present day, with any hope of success. Wherever, from the existence of a legal impediment, or the death of the young woman, the ultimate ceremony has been prevented from taking effect, the bridal presents are returnable, the bridegroom, in the latter case, paying the expenses incurred on both sides. (4) These presents, where the marriage has been completed, constitute part of the woman's *Stridhana*, as explained in the preceding chapter. (5) They must be *bonâ fide*, however; that is, tokens of courtesy, and the fruit of affection

(1) Append. p. 30.—C.

Introit in ædes ater alienus canis;
Anguis per impluvium decidit de tegulis;
Gallina cecinit;—interdixit hariolus;
Haruspes vetuit ante brumam aliquid novi
Negoti incipere, &c.

Ter. Phormio, Act IV. Sc. iv.

(2) Menu, ch. IX. 72. Culluca Bhatta, 2 Dig. 493.
Vasishta, Id. 490. Yajnyawalcya, Id. 492.

(3) Nareda, 2 Dig. 492. Append. p 31

(4) Mit. on Inh. ch. II. sect. xi. 29, 30.
Saucha, 3 Dig. 614. Append. p. 29.

(5) Ante, p. 28.

toward the girl, not received by her kinsmen for their own use, amounting to a sale of her, which is forbidden.(1) Where such a gratuity had been given, and the man died before consummation, the widow was anciently marriageable to his brother, he and she both consenting; his consent being specially requisite, she being considered as blemished, by having been previously affianced to another. (2) Such a union is not to be confounded with a practice of appointing a brother (or other near kinsman) to raise up issue to a childless husband; which, having existed among the Patriarchs, received from Moses the sanction of law; but which, reprobated from the beginning by the higher classes of the Hindus, appears never to have prevailed but among Sudras only.(3) As was the case with the Hebrews in respect of tribe,(4) so with the Hindus, the contracting parties must be of the same *class*.(5) Without identity of class between the married parties, the issue, according to some authorities, was not esteemed legitimate; while, according to others, the stipulated equality was so construed, as to admit, within that description, the offspring of lawful espousals, between a man of a superior, and a woman of an inferior, provided she were of a *regenerate* tribe; by regenerate, being intended any, other than that of the

(1) Menu, ch. III. 51. 54. Ch. IX. 98. 100. Ante, p. 42.
(2) Menu, ch. IX. 69. 97. 2 Dig. 466. Append. p. 93.—E.
(3) Menu, ch. IX. 59. 64. 66. 2 Dig. 466.
Append. to ch. III. p. 93. 139. 175.
(4) Numbers, ch. XXXVI. v. 6.
(5) Menu, ch. III. 4. Apastamba, 3 Dig. 159.

Sudra; that is, any of the three superior ones;(1) the old law permitting men of higher tribes to marry in tribes so far below them; and allotting, to the issue of such marriages, shares of the heritage, in certain decreasing proportions. Such was the doctrine of the Eastern school, in which equality of class was, with reference to the wife, understood as excluding, for a man of any of the three superior ones, a Sudra woman only. And, though the writers of the Western school extended the license without reserve, there is said, while it prevailed, to be no mention, even in the recital of any ancient story, of a woman of the servile class becoming the first wife of either a Brahmin, or a Cshatrya, though ever so much at a loss for a suitable match—in such low estimation was the Sudra held by the other classes.(2) But it is unnecessary to dwell upon these distinctions, the practice of such intermarriages being considered to have been prohibited from the commencement of the present (the Cali) age; (3) since when, equality of tribe has been ever, as it is, in the strictest sense, essential to a legal marriage, though not to the legitimacy of the issue: inasmuch as, should one so prohibited take place, the issue would notwithstanding be legitimate. But the

(1) *Regenerate*, has reference to the three classes of Brahmin, Cshatrya, and Vaisya, meaning, born a second time, through the ceremony of *Upanayana*, when these higher classes were invested with the distinguishing thread; the Brahmin before the age of nine, and the other two classes at any time previous to the nuptial ceremony. On it depends also the commencement of the connexion between the pupil and his spiritual teacher for the purpose of instruction in the Vedas.

(2) Menu, ch. III. 14. Id. ch. IX. 178.

(3) Jim. Vah. ch. XI. sect. i. 47.
Mit. on Inh. ch. I. sect. viii.
Sutherland's Synops. p. 213.

converse does not hold: the offspring of a woman of a superior tribe, by a man of an inferior one, being excluded from the definition of legitimacy, and consequently debarred from inheriting.(1) But, though the *class* must be the same, the parties must be of distinct, and unconnected *families*, as by the Jewish, and other codes; a condition, that is, by the Hindu law, carried much farther than in the Levitical, by which ours is, in this respect, regulated.(2) The marriage of a Sudra, indeed, with a woman of the same primitive stock is allowed; and the son born of such marriage is of course capable of inheriting.(3) But, among the other castes, a woman, to be in this respect eligible, must not be descended from the paternal, or maternal ancestors of her proposed husband, within the sixth degree: and, upon the principle (as will hereafter appear) that an *adopted* son identifies, to all intents and purposes, with a natural one, it follows that a marriage by such a son, with the daughter of him by whom he has been adopted, would be incompetent,—liable to be regarded as incestuous, like a person marrying his own sister. These points were agreed in a late case before the Supreme Court at Madras, after deliberation, and consulting with the Judges and Pandits of the Sudder Dewanny Adawlut at that Presidency, and after obtaining the opinion of the Pandits of the Supreme Court at Calcutta, with those of the most learned native

(1) Mit. on Inh. ch. I. sect. xi. 2.
(2) Menu, ch. III. 4, 5.
(3) 3 Dig. 329.
Asiatic Res. vol. v. p. 67.

jurists in several of the Provinces.(1) Various texts of Menu discountenance the marriage of a younger brother, or sister, before their elder.(2) Distinctions as to caste entering into almost every concern of Hindu life, the important one of marriage has its appropriate forms.(3) Eight are enumerated, the *Brama*, *Daiva*, *Arsha*, (or *Rishis*,) *Prajapatya*, (or *Caya*,) *Asura*, *Gandharva*, *Racshasa*, and *Paisacha*. Of these, the four first, being approved ones, are proper for the Brahmin; the three next for the other classes; that is the *Gandharva* and *Racshasa* are permitted to the Cshatrya, or military class, and the *Asura* to the mercantile and servile ones. Such is the usual distribution; though Menu, as regarding the succession to the property of the woman, received at the time of her marriage in an *unblamed* form, adds the *Gandharva* to the four first.(4) Nuptial rites, accompanying them all,(5) have the effect of distinguishing even the less approved ones from commerce purely illicit, to which otherwise the *Gandharva* and *Racshasa* ones might be assimilated; the former importing an amorous connexion, founded on reciprocal desire;(6) the latter, the enjoyment of a captive seized in

(1) Saulogrammum Vencataramia Pillay *v.* Velly-Ummall and others, 3d Term, 1821. Ex relat. Sir E. Stanley, Ch. J.
Datt. Mim. sect. vi. 27. 32.

(2) Menu, ch. III. 154. 160. 170.
Note to Datt. Mim. sect. vi. 54.

(3) Menu, ch. III. 20, et seq.
Yajnyawalcya, 3 Dig. 604.

(4) Menu, ch. IX. 196.
Jim. Vah. ch. V. sect. iii. 5.
Post, p. 101.

(5) Devala, 3 Dig. 606.

(6) Menu, ch. III. 32. Yajnyawalcya, 3. 3 Dig. 604.
Post, p. 101.

war;(1) for whose lot the Mosaic law humanely provided in like manner, by requiring her captor, taken with her beauty, to marry her.(2) Of the *Asura* form, appropriated to the two inferior classes, the characteristic is the payment of money by the bridegroom, to those who give the bride away; considered to be a sordid proceeding, and, as such, constantly forbidden;(3) while the *Paisacha*, denoting an advantage taken by a lover of his mistress, when asleep, or otherwise off her guard, forbidden to all, is universally reprobated.(4) Menu, indeed, joins together the *Asura* and *Paisacha*, as never to be used;(5) and it is said in the Digest, consistently with the above remarks, that "at present, the *Brama* nuptials only are practised by "good men;" though it is admitted that the more disapproved forms, as the *Asura*, and the rest, are sometimes resorted to by others:(6) and it is questionable whether, in Southern India, any other form than the *Asura* be now observed. On the solemnization of the marriage, according to the one or the other set, depends, with the estimation of the progeny, the course of descent from the wife; as will appear in treating on widowhood.(7) The bride being known not to be a virgin, the rite is a distinct one; the customary office, founded on the Veda, expressing that "the *Virgin* (meaning the bride) worships

(1) Menu, ch. III. 26. 33. Yajnyawalcya, 3. 3 Dig. 604.
(2) Deut. ch. XXI. v. 10, et seq.
(3) Menu, ch. III. 51. Id. ch. IX. 98. 100. 2 Dig. 487. Ante, p. 38.
(4) Menu, ch. III. 34. 3 Dig. 605.
(5) Menu, ch. III. 25.
(6) 3 Dig. 606. Asiat Res. vol. vii. p. 311. C.
(7) Menu, ch. III. 42. Post. ch. XI. p. 248.

"the generous Sun, in the form of fire;"(1) an invocation, sufficiently denoting the exclusion of one who is not so.(2) Like other institutions of a mixed nature, partaking of religious, as well as civil considerations, the one in question, being duly solemnized, is celebrated with ceremonies, the details of which are thus recapitulated in the "Essay" referred to below. (3) "The "bridegroom goes in procession to the house where the "bride's father resides, and is there welcomed as a guest. "The bride is given to him by her father in the form "usual at every solemn donation, and their heads are "bound together with grass. He clothes the bride with "an upper and lower garment; and the skirts of her "mantle and his are tied together. The bridegroom "makes oblations to fire, and the bride drops rice on "it, as an oblation. The bridegroom solemnly takes "her hand in marriage. She treads on a stone and "mullar. They walk round the fire. The bride steps "seven times, conducted by the bridegroom; and he "then dismisses the spectators, the marriage being now "complete and irrevocable." The essence of the rite consists in the consent of the parties, (as with us formerly before the marriage act;)—that is, of the man on the one

(1) Menu, ch. VIII. 226.—Note to Mit. on Inh. ch. I. sect. xi. 19.—3 Dig. 280.

(2) In the Supreme Court at Madras, evidence was given of a species of marriage called *Yellatam*, amounting to a qualified adoption of the bridegroom by the bride's father; and it seemed admitted that some such custom prevailed, though the exact effect of it was not established. Vencataratmam *v.* Vencammall and others. Sup. Court, 2d and 3d Terms, 1824. Ex relatione Ch. J.

(3) Essay on the religious ceremonies of the Hindus, by Mr. Colebrooke, Asiat. Res. vol. vii. p. 309. For other descriptions of a Hindu marriage, see Dubois, on the Character, Manners, and Customs of the People of India, p. 137. And Append. to this work.

Menu, ch. III. v. 35.

hand, and, on the other, of the father, or whoever else gives away the bride. The union, once effected, involves, I. Reciprocal rights and obligations of a personal nature, as between husband and wife; II. Special rights of property; III. The right of supersession. Of each of these in its order: to which it is proposed to add, IV. A slight comparison of the Hindu law of marriage with other codes, and particularly our own, on the same subject.

I. The right of inheritance, as between husband and wife is, in a great degree, reciprocal; the latter succeeding as heir to the property of her husband, leaving no male issue;—universally, if he died sole and exclusive owner of what he possessed; but with a difference in different parts of India, according to the prevalence of different schools, in the event of his having continued at his death a member of an undivided family.(1) But, where the husband died before consummation, it has been held that his widow is entitled to *maintenance* only.(2) Her title to the inheritance depends upon her having been chaste; adultery subjecting her to degradation from caste, by the loss of which she forfeits her right of inheritance.(3) According to one authority, it puts her life in his power, if committed with a man of low class;(4) and other texts, protective of her person, even in case of infidelity, are said not to apply to the aggravated instance just mentioned.(5) For every unbecoming thought of the kind

(1) Post. ch. VII. p. 142. 156.
(2) Vencataratnam *v.* Vencammall and others; Supreme Court, Madras, 1824.
(3) Mit. on Inh. ch. II. sect. i. 39. Post, 224. 242.
(4) Vrihaspati, 2. 2 Dig. 425.
(5) Menu, 2 Dig. 425. 2 Dig. 425.

there must be expiation;(1) and, wherever the fact have taken place, there ensues for her not only a state of extreme mortification, short of nothing less than the want of necessary subsistence, (2) but it authorizes the husband to take a second, the nuptial tie with the former remaining undissolved. (3) It may be here noticed, that criminal conversation with another's wife is, with the Hindus, strictly speaking, a crime, punishable as such; by ignominious tonsure, if committed by a priest; while, in the other classes, it may extend to life; the proof being deducible from circumstances, where direct evidence is not to be had.(4) But, in the King's Courts, it would be actionable, not falling within the description of either of the two subjects, in determining upon which, these are to administer the native law. In examining the part of the law under consideration, it is painful to remark its distrust with regard to female chastity;(5) the deficiency of which, attributed by it to the constitution of the sex, may, if it exist, be more justly ascribed perhaps to their unnatural marriages, not to mention with regard to women, the peculiar constraint attending their domestic lot. (6) Liable, as the wife is, to be coerced and abandoned for misconduct,

(1) Menu, ch. IX. 21. Yajnyawalcya, 2 Dig. 424.

(2) Menu, ch. IX. 30. Id. XI. 177. Naredn, 2 Dig. 415. Id. 423. Yajnyawalcya, 2 Dig. 422. Vrihaspati, Id. 425. Append. p. 32.—E.

(3) Dubois, p. 136.

(4) Menu, ch. VIII. 352 to 362. Id. 371 to 385. Append. p. 33 to 36.

(5) Menu, ch. IX. v. 1 to 18. 2 Dig. 382. Also the twelve *Slocums*, extracted from the Mahabharata, 2 Dig. 393.

(6) Sancha and Lichita, 2 Dig. 430, 431.

desertion of a blameless one, beside being punishable in the husband, entitles her to a third of his property as a separate maintenance; (1) Menu exacting for her the utmost benevolence, (2) while he enjoins to both reciprocal constancy as their supreme law, (3) and mutual content as the indispensable condition of their happiness.(4) Other causes, as well as infidelity, operating to disappoint the primary object of marriage, lead to separation; such as confirmed barrenness in the woman, and corporal imbecility in the man; with loathsome, or incurable disease in either.(5) A husband also having provided for his wife, during his necessary absence abroad,(6) different periods are indicated, according as he has, or has not been heard of, during which, and no longer, she is to expect him back;(7) "long absence "being (said to be) considered by sages as equivalent to "natural death."(8) In a case of this kind, indeed, authority exists to justify a wife in taking another husband; since the natural passion, (says Jagannatha on a similar occasion,) "implanted in the human race by the divinity, "is not to be endured."(9) But the texts of Devala, re-

(1) Menu, ch. VIII. 389. Nareda, 2 Dig. 413.
Yajnyawalcya, Id. 420. Append. p. 38 to 43.
(2) Menu, ch. III. v. 55 to 59.
(3) Menu, ch. IX. 101, 102. Culluca Bhatta, 2 Dig. 497.
(4) Menu, ch. III. 60. 2 Dig. 401, 402.
(5) Menu, ch. IX. 81. 2 Dig. 419. Devala, Id. 414. 470.
Yajnyawalcya, 2 Dig. 418. Append. p. 45, 46.
(6) Menu, ch. IX. 74, 75. Yajnyawalcya, 2 Dig. 450.
Post, p. 275.
(7) Menu, ch. IX. 76. Devala, 2 Dig. 470, 471.
(8) 2 Dig 472.
(9) 2 Dig. 386.

ferred to, are considered as regarding past ages, not the present; and, at all events, not as legalising the act, but only as averting a consequent fine to the king; as our statute of James against bigamy, under similar circumstances, excuses the felony it creates, avoiding at the same time the attempt at a second marriage. Subtraction of conjugal rights is denounced on either side with heavy penalties;(1) and the relative duty of constantly maintaining one another, is alike inculcated.(2) The early codes of all nations seem to have subjected the wife, among other members of a man's family, to corporal chastisement; the civil law, to the extent of allowing the husband, for some misdemeanours, *flagellis et fustibus acriter eam verberare*,—for others, *modicam castigationem adhibere*. Our own gave the like permission, restricted only within somewhat more reasonable bounds;—and Menu, whether he set, or only followed the unmanly example, certainly includes the wife among objects of domestic discipline, when conceived to deserve it. Less brutal indeed, in this respect, than the civil law, with him the authorised instrument is, "a small shoot of "a cane;" to which truth, however, compels to be added, the option of "a rope;"—the correction however to be inflicted "on the back part only of the body, and not on "a noble part, by any means."(3) For what sort of de-

(1) Menu, ch. IX. 4. Id. 2 Dig. 416.
Vrihaspati, 2 Dig. 386. Smriti, Id. 425.
(2) Menu, ch. VIII. 389. 3 Dig. 406. 460. Id. 26.
(3) Menu, 2 Dig. 209. Id. 441. Menu, ch. IX. 290.
Culluca Bhatta, 2 Dig. 421.

linquences such barbarism might be indulged, may be collected perhaps out of an extract from Harita,(1) with the comment on that citation. But, for the credit of Hindu law, a maxim, of authority deemed to be equivalent to that of Menu, says beautifully, "strike not, *even* "*with a blossom*, a wife guilty of a hundred faults."(2) And it may be confidently assumed that, at this day, in no British Court, administering whether the English or the Hindu law, would the claim be tolerated for an instant, justifying so much as the lifting up a finger against a woman, any more than that of "slaying or mutilating "her;" which, in the case of a wife, the latter may be said always to have prohibited.(3)

II. Though a wife be one of three persons declared to have in general no wealth exclusively their own, the position is modified by the authority that lays it down;(4) —and it is certain that, beside the contingency of her succeeding as heir to her husband, a Hindu wife has present rights of property, of two kinds:—1. That *Stridhana*, which being, generally speaking, exclusively hers, has already been treated of at large, under the title of *property*;(5) and to which there will be occasion to recur, in describing its descent.(6)

(1) 2 Dig. 433, et seq.
(2) Note to 2 Dig. 209.
(3) Menu, 2 Dig. 423.
(4) Menu, ch. VIII. 416. 2 Dig. 249.
(5) Ante, p. 25.
(6) Post, p. 247.

2. Whatever is not *Stridhana* is possessed by the wife, subject to the direct and unlimited control of her husband. This, upon the preponderance of authorities, may be taken to comprehend what she acquires by her industry, (1) together with what she obtains from strangers, or inherits, on failure of nearer heirs. (2) It has already been stated, with regard to what devolves on her by inheritance, that the rule as to her property in it is not uniform in the different schools; (3) while, with respect to the other two sources just mentioned, Jagannatha (4) observes, that "no argument is found to shew, "why a woman should not have independant power "over that which she has gained by arts, or which has "been given to her by a stranger on a religious consi- "deration, or through friendship, but should have inde- "pendant power over that which was received as a "*bribe*;"—alluding to the instance N° 2, in the preceding enumeration of *Stridhana*. (5) It is necessary also, in every case of ornaments belonging to her, to distinguish between such as were given to her by her husband, or some of her relations, on, before, or connected with her marriage, and those worn by her occasionally, not having been so given; the latter not being her property, but her husband's, descendible to his heirs, she surviving him, and divisible among them on parti-

(1) Menu, ch. VIII. 416.
2 Dig. 249. 3 Id. 566.
(2) 3 Dig. 566, et seq
(3) Ante, p. 30.
(4) 2 Dig. 570.
(5) Ante, p. 28.

tion: but it is otherwise if they were habitually worn by her; since this would imply that they were hers; in which case, they are not partible. (1)

Of her property, of whatever kind, she dying in the life of her husband, it is a general rule, that, if she die without issue, it goes to her husband, or his nearest kinsmen (*sapindas*), allied by funeral oblations, provided the marriage was in an approved form; if otherwise, to her father. (2) But Jimuta Vahana and Jagannatha say, that it applies to that part of her property only which is acquired at the time of her marriage; (3) while Vijnyaneswara, the Madhavya, and other southern authorities are silent as to any such distinction. Leaving issue, it will go to her immediate female descendants, whether daughters, or grand-daughters,—the grand-daughters taking *per stirpes;* the unmarried, and unendowed, of the one, or the other, taking first. Where there are both daughters and grand-daughters, it vests in the daughters exclusively, subject to such a provision for grand-daughters, as usage may warrant. (4) Daughters take equally, subject to the above distinction of married and unmarried; failing female issue, sons and grandsons succeed; and,

(1) Menu, ch. IX. 200. 3 Dig. 571. Apastamba, 3 Dig. 570.
Devala, Id. 577. 469. Mit. on Inh. ch. I. sect. iv. 19.
Append. p. 19. 47.
(2) Menu, ch. IX. 196.
Yajnyawalcya, 3 Dig. 606. Nareda, Id. 608.
Mit. on Inh. ch. II sect xi. 10, et seq.
Append. p. 50.
(3) 3 Dig. 608, 609.
(4) Menu, ch. IX. 193. 3 Dig. 600.
Mit. on Inh. ch. II. sect. xi. 17.

failing the latter, the husband and his relatives. (1) What is called the wife's *fee*, or gratuity, goes, by way of exception, to her brothers of the whole blood. (2) So much, with regard to the descent of the property of the wife, dying in the life of the husband. For the descent of that of the husband, he dying first, it forms the subject of the chapter on Inheritance. (3) And the descent of the widow's is reserved for the chapter on Widowhood. (4)

III. Though it cannot, with Justinian, be said of the Hindus, *duas uxores eodem tempore habere non licet*, and though it be made a question, whether, in any case, bigamy, by their law, be punishable as a crime, (5) it results from different texts, that a second marriage, by a man, his first wife living, is not at his mere pleasure. It is, with reference to the first, called *Supersession;* (6) which, according to circumstances, is justifiable, admissible, or illegal.

1. The grounds that justify it regard her conduct, her temper, or her state of health; to which may be added barrenness, or the producing only daughters, during a period of ten years. (7) In any of these cases, cheerful acquiescence on her part entitles her to be

(1) Mit. on Inh. ch. II. sect. xi. 24, 25.
(2) Mit. on Inh. ch. II. sect. xi. 14. Ante, p. 28.
(3) Post, p. 141.
(4) Post, p. 286.
(5) Append. p. 42.
(6) Note to Mit. on Inh. ch. II. sect. xi. 2. and Id. 34.
(7) Menu, ch. IX. 80, 81. Devala, 2 Dig. 414. Id. Rammohun Roy's "Brief Remarks," p. 9.

treated with proportionable liberality, while contumacious opposition subjects her to coercion, to public exposure, nay, even to the discipline of the rope. (1) 2. Upon the principle of *volenti non fit injuria*, the first wife's *assent* supplies the want of a justifiable cause, as may be collected from various passages, indicating the means of obtaining it, and reconciling her to the intended purpose, by a suitable settlement; (2) the measure of which is differently defined; (3) the most intelligible one being "a compensation, amounting, with her pre-"vious *Stridhana*, to a value equivalent to the expenses "of the second marriage." Such is the one adopted by Mr. Colebrooke; (4) while Jagannatha, on a review of the several criteria proposed by different authors, conceiving the best to be illusory, concludes that a rule on the subject remains yet to be formed, on due consideration of the difficulties attending it. (5) That, in estimating it, account is to be taken of what she already possesses, and that the difference only is to be given her, all are agreed; and, if the difference be the other way, then a trifle only, for form's sake. (6)—This *present*, (as it is called,) however settled, classes as *Stridhana*,

(1) Menu, ch IX. 83 Culluca Bhatta, 2 Dig. 421.
(2) Jim Vah. ch. IV. sect. i. 14.
Mit. on Inh. ch. II. sect. xi. 34, 35.
Yajnyawalcya, 3 Dig. 558.
Append. p. 51.
(3) Yajnyawalcya, 3 Dig. 17. 561.
Sricrishna Tercalancara, and Vijnyaneswara, 3 Dig. 18.
Mit. on Inh ch II. sect. xi. 34, 35.
(4) Append p. 44.—C. Id. to ch. XII. p. 410.
(5) 3 Dig. 562.
(6) Id. and Daya Cr. Sangraha, ch. VI. 28, et seq.

as has been already noticed.(1) 3. *Illegal* supersession, is the abandoning, with a view to another, a blameless and efficient wife, who has given neither cause nor assent;—a conduct, for which the husband (says Nareda)(2) shall be brought to his senses by the king, "with "a severe chastisement;" the same doctrine being held by Vishnu,(3) the Smriti Chandrica,(4) and other authorities; the desertion of a woman by her husband for any offence whatever, less than actual adultery, having been declared, by an anonymous *Smriti*, to be among the parts of ancient law, that were abrogated at the beginning of the present age.(5) A wife superseded, under whatever circumstances, must be provided for;(6) a benefit that is construed by the Pandits as rendering it imperative upon her to continue to reside in the house with her husband, his fickleness even not absolving her from her nuptial vow. And, under whatever circumstances she live apart from him, it is her duty to seek protection from his relations, and, failing them, from her own.(7) "But (says "Dacsha, very feelingly) with sorrow does he eat, who has "two contentious wives."(8) To avoid one obvious ground

(1) Ante, p. 29.
(2) 2 Dig. 413.
(3) 2 Dig. 414.
(4) Append. p. 38. 41.—C.
(5) General note, end of translation of Menu, p. 355.
(6) Culluca Bhatta, 2 Dig. 412.
Yajnyawalcya. Id. 421.
(7)
(8) 2 Dig. 111.

where a plurality exists, the important point of precedency among them is settled by law. While the practice existed of contracting marriages in different classes, it was according to the order of class; the wife of the same class with the husband ranked before all the others;—dignity of class prevailing against the influence of more youthful charms, and a later selection. Her pretension consisted in the privilege of personal attendance on her husband, notwithstanding her supersession, and in performance of the daily business relating to acts of religion;—objects, in the discharge of which it would have been discreditable to have suffered the wife of an inferior one to intermeddle. The latter indeed were rather in the nature of *Concubines*, being described by distinct appellatives. At least, they were not regarded as possessing the rank of regular wives, the law distinguishing between the wife, and the espoused woman. (1)—Like the concubine among the old Romans, described as *quam quis non mariti animo, sed concubitûs causâ, sine stupri tamen crimine flagitiove, domi habet;* the connexion constituting amongst them a sort of left handed matrimony, as contra-distinguished from *nuptial*, or lawful wedlock—the countenance given to which has been considered as approaching very near the polygamy of other nations. (2) But this confusion of classes

(1) Menu, ch. IX. 85—87. Id. ch. III. 17—19.
Nareda, as referred to in Jim. Vah. ch. XI. sect. i. 48, 49.
Mit. on Inh. ch. II. sect. i. 7. 28.
3 Dig. 484, et seq.

(2) Elements of Civil Law, p. 265.

by intermarriages has long since ceased; (1) and now that the parties must necessarily be of the same class, the one first married is the one to be still honoured, not having been superseded for any fault. (2) Other rules of preference are laid down, applicable to particular cases; but, in general, the *elder* wife, as she is called, takes the lead; elder, not necessarily in years, but according to priority of nuptials: (3) her husband's union with her being considered in law as having proceeded from a sense of duty, while his marriage with any other, she living, is referred rather to an impulse of passion. (4) How many it is competent for a Hindu to have at one and the same time, does not distinctly appear. (5) She it is, (the elder or first,) that succeeds eventually to her husband as heir, maintaining the others, who inherit in their turn on her death; or even during her life, in the event of her degradation, or the like;—possessing, as they do, a capacity for the performance of religious ceremonies, being the consideration upon which the widow, as well as the son, is preferred in inheritance. (6) Such are the topics controvertible among the Hindus, between husband and wife. Infinitely delicate in their nature, judicial interference with them is far from being encouraged by their law, (7) the spirit of which, in this respect, has been virtually adopted by our own, in the

(1) Ante, p. 38.
(2) Yajnyawalcya, 2 Dig. 405, and note to Id. 406.
(3) Catyayana, 2 Dig. 407. Gen. ch. XVI.
(4) Note to 2 Dig. 406. Dacsha, 2 Dig. 409. Post, p. 100. 158.
(5) Note to Jim. Vah. ch. IX. 6.
(6) Mit. on Inh. note to ch. 11. sect. i. 5.
Post, ch. VII. on Inheritance, p. 156.
(7) *Smriti*; 2 Dig. 208, with the note. Id. 377.

enactments of the Charters and Acts of Parliament for India. But, however uncreditable or unbecoming such litigation may be, it is not so prohibited, as to exclude either the one or the other party from the protection of our courts;(1) in which, no doubt, as with us in our King's Bench, *articles*, for instance, might be exhibited with effect, by the wife against the husband; the Court, in the exercise of its jurisdiction between them, having regard always to the acknowledged authority, according to their own law, as recognised by ours, of the *Master of a family*.

IV. The comparison intended here between the Hindu and other codes, our own especially, on the subject under consideration, having been in some degree incidentally anticipated, a few additional remarks will suffice to answer the proposed purpose of illustration. The requisition of the Hindu legislator, that fidelity between man and wife should be mutual, was equitably and generously inculcated by the Civil law, directing that "*judex adulterii* "*ante oculos habere debet, et inquirere, an maritus, pudicè* "*vivens, mulieri quoque bonos mores colendi autor fuerit:*" adding, "*periniquum enim videtur esse, ut pudicitiam vir* "*ab uxore exigat, quam ipse non exhibeat.*" Upon which principle it is, that a husband cannot obtain a divorce in the English Ecclesiastical Courts for the adultery of his wife, she recriminating with effect. On the other hand, if the Hindu law allows subsistence to an adulterous wife,

(1) 2 Dig. 378. Append. p. 52.

it is in this respect more liberal toward her than the English would be; which, in case of divorce by the Ecclesiastical Court for adultery, refuses her alimony, as it forfeits to her also her right to dower after her husband's death. The difference between the two codes, in the manner of viewing and treating the act of criminal conversation with another's wife, the one proceeding against it as a crime, the other regarding it as a private injury only, to be compensated by damages, has already been noticed: but it is here to be observed, that the remark is true as applicable to the temporal Courts only, —the spiritual ones in England taking cognizance of it as an offence, with a sparingness however in point of penalty, according to the provisions of the Canon law, that has been attributed to the constrained celibacy of its first compilers; so that it meets with its most effectual corrective, after all, at the hands of a jury at the common law, in an action of trespass. For infidelity, or other ill usage on the part of the husband, destructive of domestic happiness, the English wife has her remedy in the last mentioned Courts; which have jurisdiction, in case of divorce, to provide for her out of his funds, according to her rank and condition in life, the means of her husband, and the circumstances of the case; whence, upon the whole, it would appear, that a considerable analogy exists between the Hindu and the English law, upon this delicate subject.

An English wife does in no case inherit to her husband; and here, therefore, the Hindu possesses an advantage over her; as she does perhaps also in the

law of maintenance generally, as likewise of *Stridhana*, or a Hindu woman's exclusive property; to which the *paraphernalia* of an English one bears an imperfect resemblance, *pin-money* bearing none, being matter of contract and settlement.

For the law of *polygamy*, of which the practice is so familiar among the Hindus, it admits of less comparison. Not prohibited merely, the thing is with us a crime, punishable as felony: and even among the Hindus, it appears to be sanctioned with considerable reserve, principally where the failure of legitimate male issue (with them the indispensable end of marriage) seems otherwise, upon reasonable grounds, to be apprehended. Introduced into the world before the deluge, it was in use among the Jews, though not explicitly allowed by their law; the first instance of it upon record, that of *Lamech*, one of the descendants of Cain, having always been considered as a departure from the original institution of marriage, as ordained to our first parents; (1) and it was forbidden by Christianity, that republication of the pure and undefiled law of nature. The Mahomedans in this respect imitate the Jews. "*Apud Græcos aut Romanos*, (says Selden, (2)) *rara qui-*" *dem polygamia, seu legitimarum, seu justarum uxorum* "*plurium simul exempla.*" How *concubinage* prevailed among the Romans, till prohibited by the Imperial Constitutions, has already appeared. And if, among the

(1) Levit. ch. XVIII. 18. Deut. XXI. 16.
2 Sam. XII. 8. Gen. IV. 19. Id. II. 24.

(2) De jure Nat. et Gent. juxta disciplinam Hebræorum, lib. v. c. VI.

Greeks, a wife could not be *superseded*, as she may be among the Hindus, too much at the pleasure of the husband, an Athenian one might be *bequeathed* by will, as appears by the bequest of one, of which the form is given by Sir William Jones, in his Commentary on *Isæus*. (1)

Not only have the Acts and Charters for the King's Courts in India prescribed, as the rule of determination between Native and Native, the native law, in all matters coming before them of *Contract* and *Inheritance*, but, in providing for their modes of proceeding, they have been careful to enjoin generally, wherever the Natives are concerned, an especial attention to their *religion, manners, and usages*. These Courts exercising their jurisdiction in towns overflowing with native population, such a deference to local and ancient institutions was dictated alike by policy and justice. And the same considerations applying with increased force to the Company's, dispersed in the interior, where the population is wholly of this description, hence the necessity of some attention being paid by us to the Indian codes, and particularly to that of the Hindus. And though marriage, with the relations of man and wife, be not among the titles specially committed to us by those Charters, to be determined according to the law of the parties, and though the differences arising from these relations will often be of a kind with which the less we interfere, the better, (2) it is obvious that a

(1) P. 177 4to edit 1779

(2) Append. p. 53.—E.

suit for the *inheritance* may turn upon a question, belonging to the subject of which it has been the business of the preceding pages to exhibit a view;—a question, therefore, upon which even the King's Courts may have incidentally to decide; in which, with the exception of the titles that have been specified,—upon all others, unconnected with them, the Native, equally with the British inhabitant, is, in general, at the several Presidencies, bound by the English law.

CHAP. III.

ON ADOPTION.

HAVING, in the preceding chapter, treated of *marriage*, with the reciprocal rights and duties of husband and wife, the transition would be easy to the subject of *widowhood*, which, peculiar as it is among the Hindus, demands a separate consideration. But as this must include an account of succession to whatever property the widow may have possessed either during, or subsequent to her coverture, it will be more intelligible, if reserved till after the general law of inheritance shall have been discussed. (1) And the primary object of marriage, with the people in question, being the birth of a son, the present chapter will be conveniently appropriated to that of *adoption*, as a substitute for the failure of male issue: the future beatitude of the man depending, according to Hindu superstition, on the performance of his obsequies, (2) and the payment of his debts by a son, (3) as the means of redeeming him from an instant state of suffering after death. The dread is, of a place called *Put*; (4) a place of horror, to which the manes of the

(1) Chap. VII. p. 141.

(2) For an account of these, see note to Datt. Mim. sect. iv. 72, and note to Datt. Chandr. sect. i. 21.

(3) Nareda, 1 Dig. 291. Id. 3[illegible], et seq.

(4) Menu, ch. IX. 138. Id. IV. 88, 89.
Jim. Vah. ch. V. 6. 3 Dig. 158. 293, et seq.
1 Epist. of Peter, ch. III. 19.

childless are supposed to be doomed; there to be tormented with hunger and thirst, for want of those oblations of food, and libations of water, at prescribed periods, which it is the pious, and indeed indispensable duty of a son *(puttra)* to offer. Of the eventual condition alluded to, a lively idea is conveyed, in the representation of the sage *Mandagola*, "desiring admission "to a region of bliss, but repulsed by the guards, who "watch the abode of progenitors, because he had no "male issue;" (1)—and it is illustrated by the special mention of heaven being attained without it, as of something extraordinary.(2) Marriage failing in this its most important object, in order that obsequies in particular might not go unperformed, and celestial bliss be thereby forfeited, as well for ancestors, as for the deceased, dying without leaving legitimate issue begotten, the old law was provident to excess; whence the different sorts of sons enumerated by different authorities, all resolving themselves, with Menu, into twelve;(3) that is, the legally begotten, and eleven subsidiary ones,—reckoning the son of the appointed daughter *(putrica putra)* (4) as the same in effect with the one legally begotten, and therefore not to be separately accounted;(5)—all formerly, in their turn and order, ca-

(1) 3 Dig. 153.
(2) Menu, ch. V. 159.
(3) Datt. Mim. sect. i. 3. Datt. Chandr. sect. i. 3.
Menu, ch. IX. 158. 160. Beng. Rep. 1816. p. 508.
Append. p. 58.
(4) Append. p. 173.
(5) Menu, ch. IX. 158, et seq.
Note to Mit. on Inh. ch. I. sect. xi. 22.
Datt. Mim. sect. ii. 55. 58.

pable of succession, for the double purpose of obsequies and of inheritance;(1) six (reckoning, with Menu, the legally begotten, and the son of the appointed daughter as one) deriving their pretensions from birth, six from distinct adoptions;(2) the first of the twelve, namely, the issue male of the body lawfully *begotten* being the principal one of the whole,(3) as the son *given* in adoption was always the preferable one, among those obtainable expressly in this mode.(4) And now, these two, the son by birth, emphatically so called, *(Aurasa,)* and *(Dattaca)* the son by adoption, meaning always the son *given*, are, generally speaking, the only subsisting ones allowed to be capable of answering the purpose of sons;(5)—the rest, and all concerning them, being parts of ancient law, understood to have been abrogated, as the cases arose, at the beginning of the present, the *Cali* age. It is so stated in the "General Note" at the end of the translation of Menu,(6) and elsewhere repeated;(7) though it has been disputed;(8) and it is true that, in some of the northern provinces, forms of adoption, other than that of the *Dattaca*, at this day prevail.(9) It is also true that, failing a son, a

(1) Datt. Mim. sect. ii. 61, 62, and note.
(2) Menu, ch. IX. 158.
(3) Menu, ch. IX. 166.
(4) Yajnyawalcya, 3 Dig. 241.
(5) Note to 3 Dig. 276. Append. p. 58. 154.
(6) Menu, p. 363.
(7) Datt. Mim. sect. i. 64. Datt. Chandr. sect. i. 9. 3 Dig. 271. 288. Mohun Sing v. Chumun Rai; Beng. Rep. ante 1805. p. 31. Beng. Rep. 1816. "Remarks," p. 511. Append. p. 164.—C. Id. p. 179. 174.
(8) Append. p. 94.—E.
(9) 3 Dig. 276. 289.

Hindu's obsequies may be performed by his widow; or, in default of her, by a whole brother, or other heirs;(1) but, according to the conception belonging to the subject, not with the same benefit as by a son. That a son, therefore, of some description is, with him, in a spiritual sense, next to indispensable, is abundantly certain. As, for obtaining one in a natural way, there is an express ceremony, *(punsavana,)* that takes place at the expiration of the third month of pregnancy, marking distinctly the importance of a son born, so is the adopting of one as anxiously inculcated, where prayers and ceremonies for the desired issue have failed in their effect.(2) But, exacted as it is, wherever the want exists, in terms sufficiently peremptory, it is a *right*, and not a *duty*, the enforcement of which belongs to the civil power.(3) No good Hindu lawyer, sitting in any of the King's, or Company's courts in India, would listen for a moment to an application to compel a childless Hindu to adopt—succession to his property being at all events provided for, whether he have a son to inherit it, or not. Assuming, then, the son *given* for the purpose to be the only subsidiary one now generally recognised,(4) what is farther material to be

(1) Vrihaspati, 3 Dig. 458.
Vriddha Menu, 3 Dig. 478.
Datt. Mim. sect. i. 58.

(2) Datt. Mim. sect. i. 3. 5. 45.
Notes on Id. 51, 52.

(3) Append. p. 59.—C.

(4) Datt. Mim. sect. i. 64.
Datt. Chandr. sect. i. 9.
Id. Synops. 211. 3 Dig. 289
For a fuller account of the series of sons, according to the ancient law, see Append. p. 168.

known in the law of the subject, may be comprehended under the four following heads:—I. The right of adoption, as well with regard to the giver, as to the receiver—the natural, as the adoptive parent. II. The person to be adopted. III. The mode and form;—with, IV. The effect of adoption. To which will be added, V. Some remarks on the practice among other nations.

I. The right of adoption is in one destitute of legitimate male issue, competent to the performance of his funeral rites; never having had any, or having lost what he had. The right of inheriting, and that of performing for the ancestor his funeral obsequies being correlative, if, by any of the legal disabilities, as by degradation from caste, by insanity, incurable disease, or otherwise,(1) living issue have become disqualified in law for the former, the effect for the purpose in question being the same as if none existed, it is inferred that the right to adopt attaches.(2) On the other hand, adoption by one, being himself, through any of the operative causes, incapable of inheriting, seems to be of a qualified nature, not entitling the adopted to the full rights of his condition.(3) The necessity of the thing applies, whether a man be single, married, or a widower; since to all, equally, his future state, according to his conception of it, is of the last importance. If, with the Hindus, the

(1) Post, ch. IX. p. 213.

(2) Shamchunder v. Narayni Dibeh; Beng. Rep. 1807, p. 135. Mr. Sutherland's Synops. p. 212.

(3) Datt. Chandr. sect. vi. 1. note. Mr. Sutherland's Synops. p. 212; and note iv. to [illegible] Post, p. 85.

competency of a single man to adopt do not appear to rest upon much authority,(1) it is probably owing to the circumstance of the marriage of males, as well as of females, at a comparatively early age, being so universal, that celibacy is scarcely known among them.(2) In general, it is in default of male issue that the right is exercised ;(3) *issue* here including a grandson, or great grandson.(4) But, as there exists nothing to prevent two successive adoptions, the first having failed, whether effected by a man himself, or by his widow or widows after his death, duly authorized,(5) so, even where the first subsists, a second may take place, such having been the pleasure and will of the husband; upon the principle of many sons being desirable, that some one of them may travel to *Gaya* ;—a pilgrimage, considered to be particularly efficacious, in forwarding departed spirits beyond their destined place of torture.(6)

The right of adoption, where it exists, is, as between husband and wife, absolute in the husband ;(7) though adoption having taken place, the adopted becomes son to both, and, as such, is capable of performing funeral

(1) 3 Dig. 252.
(2) Mr. Sutherland's Synops. note iv. p. 222.
(3) Datt. Mim. sect. i. 6.
(4) Menu, ch. IX. 137. Datt. Mim. sect. i. 13, 14.
Datt. Chandr. sect. i. 6. 3 Dig. 295, et seq.
(5) Naray Dibeh *v.* Hirkishor Rai ; Beng. Rep. ante 1805. p. 42.
Shamchunder *v.* Narayni Dibeh ; Id. 1807. p. 135.
(6) Coureepershaud Rai *v.* Jymala ; Beng. Rep. 1814. p. 466.
3 Dig. 190. 295. 297.
Asiat. Reg. vol. i. p. 286.
Append. p. 61. Contra, sed qu. Post, p. 220.
(7) Datt. Mim. sect. i. 22.
3 Dig. 244.

rites to the one, as well as to the other. A wife may adopt, but not without the assent of her husband;(1) whence it is laid down, that a widow never can adopt, as she can never have the necessary assent.(2) The objection to the wife's independant competency, from her inability, as a woman, to perform the requisite solemnities,(3) would apply equally to Sudras; who yet may, and do adopt.(4) The better reason, therefore, perhaps is, that the necessity of a son to celebrate the funeral rite regards the man, rather than the woman, who depends less for redemption upon such means; so that, whenever a woman, duly authorized, adopts, it is on her husband's account, and for his sake, not her own.(5) It is moreover laid down, in the case of women, that wherever the act to be done is (not of a spiritual, or solemn, but) of a secular nature, a substitute may be appointed.(6) Equally loose is the reason alleged against adoption by a widow;(7) since the assent of the husband may be given, to take effect (like a will) after his death; and, according to the doctrine of

(1) Datt. Mim. sect. 1. 15, et seq.
Append. p. 60.—S. 67.—S. Id. 102.—E.
Janki Dibeh *v.* Suda Shes. Rai; Beng. Rep. 1807. p. 121.

(2) Datt. Mim. sect. i. 16, et seq. and 18.

(3) Datt. Mim. sect. i. 23, 24. 3 Dig. 262.

(4) Datt. Mim. sect i. 26. 2 Dig. 109.
Append. p. 64.—E.

(5) Menu, ch. V. 160.
Datt. Mim. sect. i. 19. 29.
Notes v. vi. to Mr. Sutherland's Synops. p. 222, 223.
2 Dig. 463.
Append. p. 67.—E.
See also, however, Append. p. 60.—S.

(6) 2 Dig. 61.

(7) Append. p. 70.—S.

the Benares and Maharashtra schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians;(1) but it is otherwise by the law, that governs the Bengal provinces.(2) Upon the Benares principle, it has been thought that an adoption by a mother, under an authority given her by her (dying) son, would be good.(3) This admitted, it does not follow that it would be so, if the son left a widow; since, in that case, an adoption through the mother, would derogate from the widow's vested right. The capacity of a woman to adopt in her own right is indeed denied; yet it would appear rather that such an adoption may avail, with reference to herself, and her own exclusive property;(4) while, unauthorized by her husband, or some one duly representing him, it must be foreign to his interests; just as, before that part of the ancient law was abrogated, she could not, without his license, have admitted his brother, he dying without leaving a son, to access for the purpose of raising up issue to him, with a view to inheritance and obsequies.(5) The authority to the widow need not be in writing, though it generally is so; as in prudence it

(1) Append. p. 68. 72. 91.—C.

(2) Rajah Shum Shere Mull v. Ranee, &c. Beng. Rep. 1816. p. 506. Append. p. 72.—C.

(3) Append. p. 69. 72.—E. 70.—S. contra.

(4) Mit. on Inh. note to ch. I. sect. xi. 9.
Mr. Sutherland's Synops. note v. p. 222.
Sreenarrain R. v. Bhya J.; Beng. Rep. 1812. p. 344.
Append. p. 103.—E.

(5) Manu, ch. IX. 143, et seq. Id. 167.

ought to be, time and means existing.(1) In the case of the *Zemindar* of *Rajahashy*, it was in writing; of which a copy is subjoined, as an interesting document, illustrative of the subject.(2) In another case, cited below, a verbal one for the purpose was held good by the Sudder Dewanny Adawlut of Bengal.(3) As solicitude for his future state, and the preservation of his lineage are, with him who adopts, the motives to adoption, so present distress warrants the parents resorted to on the occasion, in giving their child to be adopted. The distress spoken of in the books has been sometimes, by a constrained construction, referred to the adopter's want of a son; (4) whereas it obviously respects the family of the child to be adopted; nor is it necessary that it should proceed, as commonly supposed, from any public calamity, such as actual famine, provided it be sufficiently urgent.(5) And, though there should be no distress to justify the gift, it will be good notwithstanding; not being vitiated by the breach of a prohibition, which regards the giver only, not affecting the thing done.(6) As in adopting, so in giving in adoption, though the concurrence of parents is desirable, the husband appears, by the weight of authority, to be independent of the wife, the father

(1) Append. p. 71.—C.

(2) Append. p. 73.

(3) Shamchunder v. Narayni Dibeh; Beng. Rep. 1807. p. 135.

(4) Datt. Mim. sect. i. 7. Id. iv. 21. Datt. Chandr. sect. i. 13.
Mit. on Inh. ch. I. sect. xi. 10. and note.

(5) Mit. on Inh. note to ch. I. xi. 10.
Append. p. 83.—E. Vid. tam. Id. 77.—E.
Datt. Mim. sect. i. 8.

(6) Mit. on Inh. ch. I. xi. 10. and note.

of the mother.(1) Of her own mere authority, the mother cannot, in general, give her son to be adopted, any more than she can adopt, her husband living, unless he have emigrated, or entered into a religious order.(2) But his assent may be presumed; (3) and, after his death, she does not want it, a widow having this power, and a wife also, if the distress be urgent.(4)

II. *The person to be adopted.* In a selection, for the purpose, consideration is to be had of the *class* to which the child to be adopted belongs; of his *relation*, as well to the adopter, as to his own family; of his *age;* and, lastly, to what extent his *initiatory ceremonies* have or have not, been already performed. 1. As in marriage, so in adoption, the parties must be of the same *class*, provided such a one be to be had, and not the adopter of one, and the adopted of another.(5) An adoption of one of a different class from the adopter has, in general, nothing but disqualifying effects. Parted with by his parents, it divests the child of his natural claims, without entitling him to the substituted ones incident to an unexceptionable one. In-

(1) Dat. Mim. sect. iv. 13—15. Id. sect. v. 14. and note.
3 Dig. 244. 254. 257. 261.
Vid. tam. Mit. on Inh. note to ch. I. sect. xi. 9. with Append. p. 106.—C. and note ix. (p. 224) to Mr. Sutherland's Synops.

(2) Datt. Mim. sect. iv. 9, et seq.
Datt. Chandr. sect. i. 31, et seq.
Note ix. p. 224, to Mr. Sutherland's Synopsis.
Mit. on Inh. note to ch. I. xi. 9.

(3) Datt. Chandr. sect. i. 32.

(4) Mit. on Inh. note to ch. I. xi. 9.

(5) Menu, ch. IX. 168. 174. Datt. Mim. sect. ii. 22.—sect. iii. 3 Dig. 275.

competent to perform effectually those rights, on account of which adoption is resorted to, he cannot inherit to the adopter, but remains a charge upon him, entitled only to maintenance.(1) 2. *Relation to the adopter.* It may be here observed, that, as no man can be compelled to adopt, so neither can any one in his own person, or any other for him, urge with effect, a right to be adopted, whatever may be his pretensions to a preference, where adoption is intended.(2) The general principle, as laid down in a recent work of great weight upon the whole of this subject, is, that one, with whose mother the adopter could not legally have married, must not be adopted; (3) and the exclusion seems to hold, applying the principle to the sex, where the adoption is by a female. (4) Though the adopted be not the actual son of the adopter, he is to resemble, and come as near to him as possible. He is to be at the least such, as that he might have been his son. But the adopter could not have married his own mother; it is a prohibited connexion. Consequently, his brother cannot be adopted by him. (5) The same consideration excludes the paternal and maternal uncles; the daughter's and the

(1) Datt. Chandr. sect. i. 14, et seq. Id. sect. vi. 4.
Mit. on Inh. ch. I. xi. 9. and note.

(2) Append. p. 74.—C. 80.—E.

(3) Sutherland's Synopsis, p. 214.
Append. p. 76.—E.

(4) Note on Datt. Mim. sect. ii. 85. Id. sect. v. 16. 20.
Datt. Chandr. sect. ii.—S.

(5) Datt. Mim. sect. ii. 30.
Note.—In 1824, a case was depending in th[illegible] of Madras, in which an elder brother was [illegible] younger one.

sister's son. (1) It must be noticed, however, that these two latter are eligible to adoption among Sudras; (2) if not also in the three superior classes, notwithstanding positions to the contrary, no other being procurable.(3) Subject to this general principle, the nearest male relation of the adopter is the proper object of adoption. This of course is the nephew, or son of a brother of the whole blood; (4) whose pretensions were, by the old law, such, that if, among several brothers, one had a son, he was so far considered to be common to all, as to preclude in every of them the power of adoption. (5) But the injunction of Menu has, in more modern times, been construed as importing only an intention to forbid the adoption of others, where a brother's son is obtainable.(6) Where there is none, the choice should still fall upon the next nearest male relation, with liberty, in default of such, to select from among distant ones: and among strangers, on failure of all kin.(7) Other authorities substitute, for more distant kin, a boy, whose father and the rest of his relations reside at no great distance, and whose family and character are therefore known; being a reading of the ori-

(1) Datt. Mim. sect. ii. 32. and note on Id. § 102. Id. sect. v. 18. Append. p. 76.—C. and E.

(2) Datt. Mim. sect. ii. 74. 93. 95, et seq. Id. note on § 102. Id. v. 18. Datt. Chandr. sect. i. 17. Append. p. 76.—C. and E.

(3) Append. p. 77.—E.

(4) Datt. Mim. sect. ii. 28, et seq.—67. Datt. Chandr. i. 20. Append. p. 78.—C. and E.

(5) Menu, IX. 182. Mit. on Inh. ch. I. xi. 36. Datt. Mim. ii. 73. 3 Dig. 266. Append. p. 84.

(6) Datt. Chandr. sect. i. 20, 21, and note on § 22.

(7) Datt. Mim. sect. ii. 74. Mit on Inh. note to ch. I. xi. 36.

ginal text, adopted by Balam-Bhatta, a sensible expositor of Hindu law.(1) But the result of all the authorities upon this point is, that the selection is finally a matter of conscience and discretion with the adopter, not of absolute prescription, rendering invalid an adoption of one, not being precisely him who, upon spiritual considerations, ought to have been preferred.(2) But, though the adopter have this latitude, it is subject not only to the consent, but to the state also of the family, to which he eventually resorts to supply his want. For the interest that every Hindu father has in his own obsequies, restrains the parting for adoption either with his *eldest*,(3) or with an *only*(4) son; it being of such comparative importance to him, that they should be performed by a son of his own, and, where he has more than one, by the eldest. Upon this principle, in strictness, to enable a man to give a son to be adopted, it is not sufficient that he have more than one; he should have several;(5) since if, having only two, he part with one, the death of the remaining one, leaving him destitute, would be a contingency not to be risked.(6) It does not however appear, that this ever prevailed as a rule. If therefore he have two, he may relinquish the younger; and, having but one, he may give that one, if it

(1) Mit. on Inh. note to ch. I. xi. 23. And see Append. p. 74.—E.
(2) Append. p. 74.—C. p. 80.—E.
(3) Mit. on Inh. ch. I xi. 12. Append. p. 81.—C. and E.
(4) Mit. on Inh. ch. I. xi. 11. Datt. Mim. sect. iv. 2, et seq. Datt. Chandr. sect. i. 29. 3 Dig. 242. Append. p. 82, 83. Beng. Rep. 1816. p. 507.
(5) Datt. Mim. sect. iv. 1. 7, et seq. Id. v. 14. Datt. Chandr. sect. i. 30.
(6) Datt. Mim. sect. iv 8.

be to a brother; it being agreed that the exception of an only son, however operative in families more distantly related, is not binding in the instance of a nephew, whom, in a spiritual point of view, it is of such moment to obtain, where adoption is required.(1) It is true that a brother's son, as such, inherits, and performs obsequies to his uncle, dying without preferable heirs; but then it is as his nephew, not as his son;(2) and the spiritual efficacy in the one, and in the other case, is considered to be different. To render him a substitute for a son, he must have been filiated.(3) When therefore a Hindu has but one son, and it is agreed that his brother, having none, shall adopt him, the adopted in this case has, vested in him, accumulated rights and duties. Son by adoption to his adoptive parent, he remains so, to all intents and purposes, to his natural one; becoming *Dwyamushyayana*, or son to both;(4) which, in ordinary adoptions, is not the case, as will be shewn. The same double relation may be the result of agreement, at the time of adoption, between the adopter, and him who is willing to give his son for the purpose.(5) Thus, though a youth may in this way have two fathers, he cannot have two adoptive ones; since the same son can-

(1) Datt. Mim. sect. ii. 37—39. 44.
Datt. Chandr. sect. i. 27, 28.
(2) Datt. Mim. sect. ii. 67.
(3) Datt. Mim. sect. ii. 53. 60, et seq. Id. 67. 70.
Datt. Chandr. sect. i. 22.
(4) Mit. on Inh. note to ch. I. x. 1.
Datt. Chandr. sect. i. 28.—ii. 34.—iii. 17.—iv. 1.
Append. p. 97.—C. and E. 176.
(5) Mit. on Inh. ch. I. x. 13. and note on Id. xi. 9.
Datt. Mim. sect. vi. 41, et seq.
Datt. Chandr. ii. 24. 42.

not be adopted by more persons than one, excepting as between a nephew, and several uncles; nor, in this case, is it clear that it can be always practicable.(1) An only son, then, thus adopted by an uncle, cannot become an absolutely adopted son to him, the filial relation to his natural parent remaining; and, to any other than a brother, he cannot be given at all. Such are, in this respect, the restrictions inculcated, but not always enforced; since, as in other instances, so with regard to both these prohibitions respecting an eldest and an only son, where they most strictly apply, they are *directory* only; and an adoption of either, however blameable in the giver, would nevertheless, to every legal purpose, be good; according to the maxim of the civil law, prevailing perhaps in no code more than in that of the Hindus, *factum valet, quod fieri non debuit.* 3. *Age of the boy to be adopted.* The fifth year is often stated as the extreme one for adoption, referring to an authority, the authenticity of which has been disputed.(2) Whether it may not take place at any age, is a question;(3) against which the most that can be said is, that it is dependant upon that of *ceremonies*, essential to be performed for young Hindus of the three *regenerate* (or superior) classes.(4) So long as these, not having been already performed for him in the natural family of the boy, are, with reference to his age, capable

(1) Datt. Mim. sect. i. 30. 32. Id. ii. 43, 44.
Mr. Sutherland's Synops. p. 214.

(2) Calica Purana, 3 Dig. 149. Append. p. 230.—C.
Mit. on Inh. note to ch. I. xi. 13.
Kerut Naraen *v.* Mt. Bhobinesee; Beng. Rep. 18[illegible]

(3) Append. p. 85.—C. and E.

(4) Ante, p. 39. note.

of being performed for him, in his adoptive one, so long he is young enough, and competent in that respect to be adopted. The question varies, according as the adopted is taken from a family nearly related, or from one of strangers;(1) an adult, in the case of the latter, being generally considered as ineligible, while a preference obtains universally in favour of the tenderest age; the presumption of a happy choice, that is, of one who will be most likely to assimilate with the family, into which he is to be adopted, being conceived to be greatest in the person of an infant, whose mind remains to be cultivated, and whose character is yet in no degree formed.(2) Other nations, as will be seen, have thought differently upon this point.(3) The adopted must consent:(4) but if, as usually happens, he is an infant at the time, he is bound by the act of those by whom he is so given;(5) as the consent of a girl is effectually given for her, by those who have the disposal of her in marriage. In either case, important as the transfers are, *vestigia nulla retrorsum.*

4. Not only are the Hindus deeply impressed with the certainty of a future state, upon a conviction and dread of which the practice of adoption is founded, but they also consider sin to be so inherent in our nature, as to require distinct and specific means of expiation. Hence the insti-

(1) Kerut Naraen *v.* Mt. Bhobinesee; Beng. Rep. 1806. p. 82. Append. p. 85.—C.

(2) Datt. Chandr. sect. ii. 23. note, and § 33.

(3) Post, p. 91.

(4) Kullean Sing *v.* Kirpa Sing; Beng. Rep. ante 1805. p. 9.

(5) Mit. on Inh. note to ch. I. xi. 9.
Note viii. p. 224. to Mr. Sutherland's Synops.
2 Dig. 106. 109. 3 Id. 262.

tution of a series of initiatory *ceremonies*, commencing previous to conception, and producing all together, in the three superior classes, *regeneration*.(1) It is by the performance of these, in the family and name of the adoptive father, that filiation is considered to be effectually accomplished. Accordingly the fewer of them that have been performed in the family of the adopted, previous to adoption, the better; and that adoption therefore is in this respect preferable, which takes place the soonest after the birth of the child to be adopted. With regard to two of them in particular, it is of importance that they should remain to be performed in the family of the adopter, subsequent to adoption. These are *tonsure*, or the shaving of the head, (*Chudavarana*,(2)) and (*Upanayana*) the *investiture of the cord*.(3) The affiliation of one "whose coronal "locks have not been reduced to the form of his patri-"archal tribe," is constantly inculcated. (4) The age for this operation is the second or third year after the birth; but it may be extended to the eighth,(5) which, with Brahmins, is the general period for the investiture; excepting for such as are destined for the priesthood,(6) upon whom

(1) Note to 3 Dig. 104.
Notes to Datt. Mim. sect. iv. 23. 29. Datt. Chandr. ii. 20. 22.
Abbé Dubois, on the Customs of India, p. 84. 100. 132.
Menu, ch. II. 27. 170. 172. Ante p. 39.

(2) Mit. on Inh. note to ch. I. xi. 13.
Datt. Mim. sect. iv. 22. and note to § 29.
Datt. Chandr. sect. ii. 20, et seq.
3 Dig. 148. Abbé Dubois, p. 88. 92.

(3) Datt. Chandr. sect. ii. 23, et seq. Id. 31, and note. Append. p. 95.—E.

(4) Datt. Mim. sect. iv. 34.

(5) Note to Datt. Chandr. sect. ii. 20. § 23, and note
Post, p. 308.

it is performed at five. (1) The stipulation therefore of five, as the extreme age for adoption, may have reference to Brahmins of this description. In a case cited above from the Bengal Reports, (2) the adoption is stated to have taken place at about eight, *tonsure*, which precedes *investiture*, not having been performed for the adopted in his own family; and there the adoption was held good, though the age of the adopted exceeded five, the ceremonies in question (particularly the latter) (3) remaining to be performed in the family, and name of the adopter. That they should so remain is of less consequence, in proportion as the adopted is nearly related to the adopter; (4) which seems reasonable, (if such an observation may be hazarded;) since, where a child not related by blood is to be adopted, (as may be the case where one so related is not to be had,) it may be consistent to depend for the confirmation of the tie, upon the performance of the initiatory rites in the adopting family, by means of which the adopted is considered to be in effect born again, thus becoming more essentially the son of his adoptive parent; (5) a conclusion, that appears the more forcible, considering that the *Upanayana* is the appointed season for the commencement of his education. (6) With regard to the other two regenerated

(1) Datt. Mim. sect. iv. 53, and note.
Datt. Chandr. sect. ii 30, and note.
(2) Ante, p. 76.
(3) Note to Datt Chandr sect. ii 23.
Append. p. 97.—C.
(4) Mit. on Inh. note to ch. I. xi. 13.
(5) 3 Dig. 149. 249, et seq.
(6) Note to Datt. Mim. sect iv 53.

classes, (the Cshatrya and Vaisya), the time for the performance of them varies;(1) while, with reference to the Sudra, the doctrine has no application; for him, as for women generally, there existing no ceremony but that of marriage.(2) Accordingly, in a case referred to in a subsequent page, the Pandits stated an assumption of the string in the higher classes, and marriage in the fourth, as obstacles to adoption.(3) But if, in the classes to which they apply, they have already been performed for the adopted in his own family, a remedy is found in the *putreshti*, or sacrifice to fire; by recourse to which they may be annulled, so as to admit of their re-performance, with effect, in the family of the adopter; who is thus enabled to perfect the act, upon which he relies for the continuance of his name, and solemnization of his obsequies.(4) Upon these principles, it would seem, as if there could be no adoption of one who is married; marriage not being capable, like tonsure and investiture, of annulment.(5) Any detailed account of these ceremonies, together with the rest that have been alluded to, in number not fewer than *ten*,(6) would be here misplaced; but with reference to the *Upanayana* in particular, and the import-

(1) Note to Datt. Chandr. ii. 31.
(2) Datt. Chandr. sect. ii. 29. 32. 3 Dig. 94.
Ante, p. 34.
(3) Case of Raja Nobkissen, post, p. 122.
(4) Datt. Mim. sect. iv. 40. 49, et seq.
Datt. Chandr. sect. ii. 27. 32.
Mit. on Inh. note to ch. I. xi. 13.
Mr. Sutherland's Synopsis, note xi. p. 225.
3 Dig. 149.
(5) Append. p. 63.
(6) Note to 3 Dig. 104.
Notes to Datt. Mim. sect. iv. 23. and Id. sect. vi

ance attached to it, it may be remarked, that, on this occasion it is, that the solemn recognition of the Supreme Being, in his triple character, as intimated by the triliteral monosyllable AUM, is taught the youthful Brahmin, with an injunction of secrecy;—speaking of which Menu says, "all rites ordained in the Veda, oblations "to fire, and solemn sacrifices pass away; but that "which passes not away is declared to be the syllable "AUM, since it is a symbol of GOD; the act of re-"peating whose Holy Name is ten times better than "the appointed sacrifice."(1) And it is, among other operative causes, to the acknowledged decline of these ceremonies, that the degeneracy of the present race, from the virtue of former ones, is attributed.(2) To the performance of them, on the occasion in question, in the family name of the adopter, peculiar importance is attached by a passage of the Calica Purana, purporting that, in case of their omission, in place of *filiation*, a state of *slavery* results.(3) Be this as it may, (for the genuineness of the passage is doubted, if not denied,(4)) from the mystical nature of the subject, and the discordant opinions respecting it, till it shall come to be investigated and settled, with all the information be-

(1) Note to Datt. Mim. sect. vi. 26. Menu, ch. II. 84, 85.
See also Preface to Translation of Menu, p. xviii. and Key to the Chronology of the Hindus, vol. i. p. 6.—and vol. ii. p. 76, note.

(2) 3 Dig. 222.

(3) 3 Dig. 148, et seq.—Id. 251. 2 Id. 226, 227.
Datt. Mim. sect. iv. 22. 36. 39, 40. 46.

(4) Mit. on Inh. note to ch. I. sect. xi. 13.
Mr. Sutherland's Synopsis, p. 217.—and note xi. to Id. p. 225.
Post, ch. VI. p. 133, and Append. to same, p. 230.

longing to the highest judicial authority, it may be unsafe to say that the condition of a boy, with reference to the ceremonies in question, might not be such, as to render him legally ineligible for effectual adoption.(1) In determining cases of this description, assistance must often unavoidably be sought by recourse to native living authorities, wherever haply such as can be implicitly relied upon for the purpose may be found;(2)—as must be done also in other instances, in administering a system, in which, as among the Hindus, law and religion are so intimately blended;—a British court exercising ever the most delicate caution not to meddle with matters of religion, but, and in so far, as it happens to be inseparable from the question of right; upon which alone, as it concerns property, or the civil duties of life, it is its proper function to adjudicate.(3)

III. The *mode* and *form*.—Adoption is not required to be in writing, any more than an authority to the widow to adopt.(4) But in a transaction so important as one transferring a young person from the family in which he was born to a new one, and, with a view to succession, interposing, by substitution, a comparative

(1) Note to Mit. on Inh. ch. I. xi. 13.
Note to Datt. Mim. sect. iv. 29.
Notes xi. and xii. (p. 225.) to Mr. Sutherland's Synopsis.
3 Dig. 249.
Mt. Bijya Dibeh v. Mt. Unpoorna D., Beng. Rep. 1806. p. 84.
Append. p. 130.—C.

(2) See preface to Dig. p. vi.

(3) Appendix to ch. IX p. 336

(4) Append. p. 89,

stranger between the adopter and his existing heirs, the law stipulates for whatever is calculated to give publicity. Hence, attendance of relations, with notice to the local magistrate, or ruling power of the place, is expected; but may be dispensed with.(1) The *Purohita*, or priest of the family, who performs a correspondent office in marriage, is the medium, through whom the boy to be adopted is solicited of those, by whom he is to be given;(2)—and, in a rite that has for its object the future peace of the soul, it were strange if religious ceremonies were not enjoined. Accordingly, it is to be accompanied with sacrifice, oblation, and prayer. Being also a substitute for birth, it is rendered as joyous as music, and dancing, and festivity can make it. Of all this, contemplated as it is by the law, and in the ritual of the subject, the books are full;(3) nor are any of these things omitted, where the proceeding, and matters relative to it, are *rite acta*. But as if an affair, of such consequence to both the temporal and spiritual interests of the adopter, ought not to be left dependant in a great measure upon others, the simplicity of all that is indispensable would seem to be in proportion to its importance; if, as is laid down, the will of the parties, reciprocally expressed, and car-

(1) Mit. on Inh. ch. I. xi. 13, and note. Datt. Mim. sect. v. 9
Datt. Chandr. sect. ii. 6. 3 Dig. 244.
Note xiii. p. 226, to Mr. Sutherland's Synopsis.
Gungaram Bhaduree *v.* Kasheekaunt R., Beng. Rep. 1813. p 363.
Append. p. 64.—C.

(2) Datt. Mim. sect. v. 11, 12.

(3) Datt Mim. sect. v. *passim*. Datt. Chandr. sect. ii. *passim*.
Vasishta, 3 Dig. 242. 262. Datt. Chandr. sect. ii. 16.
Append. p. 192.

ried into execution, be what alone the law ultimately exacts toward its validity in this respect: as was with us, before the marriage act, and as continues to be pretty much at this day in Scotland, the case of marriage.—The purpose must of course have been completed, to have its effect. A mere intention to adopt may be abandoned;(1)—and even an agreement for the purpose, resting there, would not invalidate a subsequent adoption. (2) There must be *gift* and *acceptance*, manifested by some *overt* act. (3) Beyond this, legally speaking, it does not appear that any thing is absolutely necessary. For, as to notice to the Raja, and invitation to kinsmen, they are agreed not to be so, being merely intended to give greater notoriety to the thing, so as to obviate doubt regarding the right of succession. (4) And, even with regard to the *sacrifice of fire*, important as it may be deemed, in a spiritual point of view, it is so with regard to the Brahmin only; (5) according to a constant distinction, in the texts and glosses, upon matters of ritual observance, between those who keep consecrated and holy fire, and those who do not keep such fires, *i. e.* between Brahmins, and the other classes; it being by the former only that the *Datta Homam*, with holy texts from the Veda, can properly be performed;(6) as was held

(1) Append. p. 89.—C. 130.—C.
(2) Append. p. 91.—C.
(3) Menu, ch. IX. 168.
(4) Mr. Sutherland's Synopsis, p. 218. and note xiii. p. 226. 3 Dig. 244. Append. p. 64.—C.
(5) Append. p. 64.—E.
(6) 3 Dig. 149. Append. p. 64. 90.—E.

in the case of the Raja of Nobkissen, by the Supreme Court at Bengal, in which the then Chief Justice(1) delivered an elaborate judgment, conformably with what had already been considered in a prior one, that had arisen some few years preceding, in the family of the Raja of Tanjore; wherein Sir William Jones was consulted by the then Governor-general of India, (2) upon a reference from the Madras Government. (3) The other classes, and particularly the Sudra, upon this, and other like occasions, perform an imitation of it, with texts from the Puranas. (4) And, even with regard to Brahmins, admitting their conception in favour of its *spiritual* benefit, it by no means follows that it is essential to the efficacy of the rite, for *civil* purposes; but the contrary is to be inferred; (5) and the conclusion is, that its validity, for these, consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being either an only, or the eldest son of the giver; the prescribed ceremonies not being essential. Not that an unlawful adoption is to be maintained; but that a lawful one, actually made, is not to be set aside, for any informality that may have attended its solemnization. (6)

(1) Sir John Anstruther.
(2) Lord Teignmouth.
(3) Notes of Cases at Madras, vol. i. p. 97.
(4) Append. p. 64.—E.
(5) 3 Dig. 244. 248. 264.
Manu, ch IX. 168.
Append. p. 90.—E.
(6) Append. p. 130. 153.—C.

IV. "When (says Jagannatha) (1) he who has pro-"created a son gives him to another, and the child, so "given, is born again by the rites of initiation, then his "relation to the giver ceases, and a relation to the "adopter commences."—Adoption being a substitution for a son begotten; its effect is, by transferring the adopted from his own family, to constitute him son to the adopter, with a consequent exchange of rights and duties.(2) Of these, the principal are the right of succession to the adopter on the one hand, with the correlative duty of performing for him his last obsequies, on the other. (3) The right attaches to the entire property of the adopter, real and personal; (4) and, in the form under consideration, (the *Dattaca*,) it operates lineally and collaterally; (5) which, in some other forms, is not the case; as appears on reference to the enumeration and distinction of sons by different authorities. (6) Admitting that one excluded from inheriting by any of the established causes of disqualification may nevertheless adopt, (7) it seems agreed that a boy so adopted, can never, by virtue of

(1) 3 Dig. 149, 150.

(2) Menu, ch. IX. 142.
Datt. Mim. sect. vi. 8. Datt. Chandr. sect. ii. 19.
Mr. Sutherland's Synops. p. 219, and Notes.
Srinath Serma *v.* Radhakunt; Beng. Rep. ante 1805. p. 16.

(3) Dutnaraen Sing *v.* Buckshee Sing; Beng. Rep. ante 1805. p. 22.
Kullean Sing *v.* Kirpa Sing; Id. p. 10. 3 Dig. 184, 185.

(4) Kullean Sing *v.* Kirpa Sing; Beng. Rep. ante 1805. p. 10.

(5) Menu, ch. IX. 158, 159. Jim. Vah. ch. X. 8.
Mit. on Inh. ch. I. xi. 30, 31.
Mr. Sutherland's Synops. p. 219,—and note xx. p. 227.
3 Dig. 272, 273.
Shamchunder *v.* Narayni Dibeh; Beng. Rep. [illegible]

(6) 3 Dig. 150, et seq.

(7) Ante, p. 65.

such adoption, inherit, where the claim to do so can only be made through the adopter;(1) and that he is entitled to maintenance only. (2) The right of inheriting also, in general, is subject to the existence of a son born at the time of, or subsequent to the adoption. According to Jagannatha, (3) it makes no difference, whether the son of the body be born before or after; in either case he assigns to the adopted, on the death of the adopter, a third of the property, as his share. In the latter case, participation is the rule, according to all the authorities; but, while the old law continued, distinguishing between different sets of sons, his claim was subject to the *sett* to which he belonged; for, if he was of the exceptionable class, his right, in the case supposed, was to no more than a maintenance;(4) a distinction, that may be now pretty much disregarded, every description of subsidiary son being, in the present age, generally speaking, reduced to the *son given.* Whether, however, the share, with regard to him, be a third, or a fourth only, is, among conflicting opinions, and various readings, left uncertain,(5) subject to the

(1) Note IV. p. 222, to Mr. Sutherland's Synopsis.

(2) Datt. Chandr. sect. VI. 1.

(3) 3 Dig 290. 292. See however, Datt. Chandr. sect. V. 33.

(4) Datt. Mim. sect. III. Datt. Chandr. sect. V. 19. VI. 4.
Jim Vah. ch. X. 7. 9. 13. Mit. on Inh. ch. I. XI. 26.
3 Dig. 175. Catyayana, Id 179.

(5) Catyayana, Datt Chandr. sect V. 16. 3 Dig. 179.
Devala, 3 Dig. 154. Jim Vah. ch. X. 7. 13.
Vasishta, Datt. Mim. sect. V. 40.—X. 1.
Datt Chandr. sect. V. 17. 19. Mit. on Inh ch I. XI. 24. 26.
Note XIII. (p 228.) to Mr. Sutherland's Synopsis.
Daya Cr. Sangraha, ch VII. 23, et seq.
According to the practice in the South of India, where there exists legitimate issue after-born, the share of the adopted is said to be a fourth.

adjustment of the difference by reference to the personal qualities of the claimant; a criterion of title, not unfrequently advanced in the Hindu law; to be ascertained, however, with more ease and certainty by the members of a family, than in a court of justice.(1) Among the Sudras, in the same event, the after-born son and the adopted share equally the parental estate. Neither is the change that takes place on adoption in the relation of the adopted, in all cases, absolute. If, in consequence of a special agreement for the purpose between the two families, or otherwise, the adopted, in becoming the son of another, does not cease to belong, as before, to his natural parents, he will perform obsequies, and succeed to both,—to his natural, as well as to his adoptive ones; as he will also do, failing male issue on the part of his natural father, whether from the adopted, who was parted with, having been his only son, or from the subsequent death of such as remained. In any of these cases, the adopted becomes son of two fathers, or, as he is called, *Dwyamushyayana;*—a term diverted from its original meaning, to signify any adopted son, retaining, with his acquired relation to his adoptive father, his connexion with his natural one;(2) in which case, he cannot marry in either family; as, in the ordinary one, he cannot marry among his adoptive, but may one of his natural relations.(3)

(1) Datt. Chandr. sect. v. 20. 22.
3 Dig. 181, 182. 238. 249. 273. 276. 286.—Post, p. 122.

(2) Mit. on Inh. ch. I. x. 1, and note. Ante, p. 74.

(3) Datt. Mim. sect. vi. 47.
Datt. Chandr. sect. ii. 40. Id. sect. iv. 7. Qu. [illegible]
Mr. Sutherland's Synopsis, p. 219.

According as this double filial connexion is consequential, or the result of agreement, the adopted is *nitya*, or *a-nitya*, a complete, or incomplete *Dwyamushyayana;*(1) though, by some,(2) this distinction is made to depend upon the adoption taking place before, or after the performance of tonsure, in the family of the adopted; the effect, in the latter case, where the adopted is from a different tribe, (*gotra,*) being, that the adoption, so far from being permanent from generation to generation, continues during the life of the adopted only; his son, if he have one, returning to the natural family of his father. In the case of simple, absolute adoption, every right and obligation being varied, the adopted, succeeding to the rights of a begotten son, ceases to be liable for the debts of his natural father, so far as such an obligation attaches, independant of assets.(3) By the laws of Solon, which introduced adoption into Greece, the adopted, by begetting a son, and leaving him in his place, might relinquish the adoptive, and resume his station in his own family. But a Hindu adoption is permanent, unless in the instance that has been alluded to of an *a-nitya Dwyamushyayana;* nor can the adopted be deprived of its advantages for any cause, or upon any pretence, that would not forfeit to a son begotten his natural right to inherit.(4) Should it have devolved upon a widow to adopt, her husband's

(1) Mr. Sutherland's Synopsis, p. 220.
(2) Append. p. 95, et seq
(3) Append. p. 99, 100.—C. Note to 1 Dig. 266.
(4) Append. p. 84.—E. p. 87 and 101.—C.

estate descending to her on his death, adoption subsequent divests her succession, like the case of a posthumous child.(1) On the other hand, and upon the same principle of the adopted representing throughout the legally begotten son, upon his death unmarried, and without issue, having survived his adoptive father, the widow of the latter, if living, would succeed as legal mother to the adopted. The property in him by adoption would not go to his natural relations, his connexion with whom, as it regards inheritance, being by that means extinct."(2)

Such are the principal points, with the rules and reasoning upon them, in the law of adoption. A few of them were discussed in a case that was before the court of the Recorder of Madras some years ago,(3) but from comparatively imperfect materials. The public were not then possessed of the extensive information on the subject, contained in Mr. Colebrooke's translations on the law of Inheritance;(4) nor of the treatises on Adoption since translated by his nephew, Mr. Sutherland;(5)—to say nothing of the MSS.; materials, that came subsequently to the hands of the author; and which have contributed so largely to every chapter of this work.

In the court which replaced that of the Recorder, (the Supreme Court of the same settlement,) a question arose

(1) Append. p. 102.—C.

(2) Datt. Mim. sect. vi. 8, et seq.
Mt. Bijya Dibeh v. Mt. Unpoorna Dibeh; Beng. Rep. 1806. p. 84.
Append. p. 104.—C.

(3) Veerapermall Pillay v. Narrain Pillay; Notes of Cases at Madras, vol. i. p. 91.

(4) The Daya Bhaga of Jimuta Vahana, and the Mitacshara.

(5) The Dattaca Mimansa, and Dattaca Chandrica.

in 1812, as to the competency, at the present day, of adoption by *purchase;* constituting the *Crita*, or eighth subsidiary, according to Menu's enumeration;—considered by all the northern authorities to be forbidden in the present age, though allowed by the ancient law, and said to be in use still in Southern India; but of which no evidence was offered on the trial, sufficient to establish it on the ground of usage;(1) while the highest authorities to the Southward, as well as in other parts of India, seemed to have long restricted adoption in general to that which takes place by *gift*. The question was not determined, the action having been compromised; but it gave rise to a discussion too closely connected with the subject of these pages, and much too instructive, not to be added to them. It will accordingly be found in the Appendix.(2) Of the various other modes, now also more or less obsolete, a separate account is inserted in the Appendix, sufficiently minute (it is hoped) to answer the purposes for which it professes to be subjoined;(3) namely, those of illustration, and curiosity.

V. As to the practice among other nations, instances occur among the Mahomedans in India, but they are of a spurious kind, resulting from their intermixture with the Hindus, not warranted by the Koran. The term, as

(1) Append. p. 156.—C.

(2) Append. p. 107 to 167; and see Gooroovummal and another *v.* Mooncasamy; Notes of Cases at Madras, vol. *i.* p. 72.

(3) Append. p. 168 to 191.

used in the New Testament, (υιοθεσια,) is applied *spiritually*, adoption not forming a part of the law among the Jews, though it existed, in a certain degree, with the Hebrews; and may have been more or less prevalent throughout the East.(1)

Among the Athenians, any citizen could adopt, not having at the time a legitimate son. An after-born son, and a previously adopted one, became co-heirs. Distress led the natural parent to part with his child, who, by the transfer, ceased to belong to his own family, except as to rights derived from or through his mother, with whom his relation continued in full force. On the other hand, adopted into a new one, he could not himself adopt; *delegatus, non potuit delegare:* neither could he devise away what he had acquired by adoption. Though irremovable by the adopter, unless for weighty reasons to be allowed by the law, the adopted could always quit the family into which he had been received, and return to his own, upon leaving behind him in the former a legitimate son. Adoption prevailed among, but was not restricted to relations; for the Athenians, in indigent circumstances, were in the practice, for money, of adopting wealthy foreigners, who, on their part, courted adoption, as it made them citizens;—and, though the selection of a child of tender age was competent, it was an argument for preferring an adult, that his qualities might be known. Adoption among them was apt to be deferred; and the appoint-

(1) Gen. ch. XV. v. 3, and note in Mant's ed. Ep. to the Romans, ch. VIII. v. 17, sed qu.

ment of an heir by will, in default of issue, amounted to one. It is remarkable that the ceremony was attested as among the Hindus, by the presence of relations, friends, and neighbours; and that the custom itself had for its object, as with them, not only the preservation of families, (against the extinction of which the Archon was by public and common law commanded, if necessary, to provide,) but *the due celebration also of the funeral rites of the adopter, and his ancestors;*—the design of the appointment by the last occupier of an estate, being expressed to be, to have a son, "who "might perform holy rites at his tomb, preserve his "race, and, by transmitting his name to a perpetual "chain of successors, confer on him a kind of immor- "tality."(1)—This appears every where in the speeches of Isæus, from which principally, as translated by Sir William Jones, the above summary has been extracted.

From Greece, the practice found its way, through the Decemvirs, to Rome: the end and conditions of it there are explained by Cicero in his speech for the restitution of his Palatine House, in which he has occasion to arraign and question the adoption of Clodius, by shewing, in opposition to it, in all its particulars, (to transcribe the account given by Middleton,(2)) "that "the sole end of adoption, which the law acknow- "ledged, was to supply the want of children, by bor- "rowing them, as it were, from other families;—that it "was an essential requisite of it, that he who adopted

(1) Commentary on Isæus, p. 193.
(2) Life of Cicero, sect. vi. vol. i. p. 358. 8vo edit. 1819.

"should have no children of his own, nor be in con-
"dition to have any;—that the parties concerned should
"be obliged to appear before the priests, in order to
"signify their consent, the cause of the adoption, the
"circumstances of the families interested in it, and the
"nature of their religious rites; so that the priests might
"judge of the whole, and see that there was no fraud nor
"deceit in it, nor any dishonour to any family or person
"concerned."

Thus transplanted to Rome, the introduction of it into Athens, with the rest of his laws, replacing those of Draco, is attributed to Solon; who, in the early part of his life, being engaged in commerce, travelled, not only upon that account, but for instruction also in the laws and usages of other nations. Where then, it may be asked, did he learn the practice of adoption? In other words, can it be doubted but that it was imported by him, mediately or immediately, from India? Of his travels too little is known not to admit the possibility of their having extended so far. That he was in Crete and Egypt is recorded; and if Sir William Jones's conjecture be maintainable, that *Minos* and *Menu* were the same person,(1) the problem is solved, and the conclusion inevitable. That the correspondence of the institution in all its main particulars, as it prevailed in the three countries of India, Greece, and Italy, was the result of communication, and not a coincidence, is infer-

(1) Preface to his translation of Menu, p. ix.
By the author of a "Key to the Chronology of the Hindus," a work written with the very best intentions, he is identified with the prophet *Enoch*.

able, considering that adoption, like inheritance, is an affair *positivi juris*, instead of depending upon those fundamental and universal principles, which, animating the breasts, and influencing the conduct of mankind in general, produce, in various subjects of familiar intercourse, an identity of rule; flowing, not from convention, but from the nature of things, from our common ideas of right and wrong, from (if it may be so said) our almost innate propensities and conceptions.

With us, the practice can be traced, if at all, only in the condition, not unfrequently imposed by wills on devisees, to take the name of the testator; which, as already intimated, according to the law as it was understood in Athens, constituted a virtual adoption.

CHAP. IV.

ON THE PATERNAL RELATION.

A HINDU family having, in the two preceding chapters, been constituted, by marriage and the acquisition of sons, either through birth, or adoption, the natural course of the subject leads next to an inquiry into the dominion over it, inherent by law in a Hindu father. And, as power exists for the sake of protection, its rights, as well as reciprocal duties, will come also to be noticed. But, to give to the subject its necessary extension, it will be proper to regard *family* in an enlarged sense, as comprehending, not only wife and children, but various connected and dependant females, such as unmarried, and widowed sisters, widowed daughters-in-law, mother, and the like, entering generally, among the Hindus, more or less, into its composition—to say nothing of *slaves;* the whole forming in the aggregate, and in the abstract idea at least of the subject, a truly patriarchal republic. What concerns the wife having already occupied its proportion of the chapter on marriage,(1) the interests of the various other females alluded to, will find their proper place, when treating on inheritance, and matters connected with that title; and

(1) Ante, ch. II. p. 34.

the subject of *slaves*, (but too prevalent in India,) will, from its importance, be reserved for a distinct chapter;(1) —it being intended in the present to discuss chiefly the paternal relation, strictly so considered; which will be done with reference, first, to property, next as to the power a Hindu father has over his issue; adding, thirdly, a few observations on the reciprocal duties of parent and child, distinguishing between legitimate and illegitimate; together with, fourthly, the notice of some substitution for a father, in the representative character of a *guardian*.

I. With regard to the dominion of the father over the family property, including what in a peculiar manner belongs to the wife, the subject having been anticipated in treating on property generally,(2) it will be sufficient to remark here, that his power to dispose of it being liable in general to the obligation of providing for the subsistence of his family, and, with regard to that part of it consisting of land, or other possessions partaking in point of law of the nature of land, to the control of his sons, as well as to specific rights in it vested by birth, in the event of its coming to a partition in his lifetime,—it would seem but reasonable that he should have a co-ordinate interest, in any which they may acquire, while their connexion, as members of the same family, continues.(3) It is accordingly laid down by Menu and

(1) Ch. VI. p. 127.
(2) Ante, ch. I. p. 14 25
(3) 3 Dig. 55.

others,(1) that they can, in general, have no wealth of their own, any more than a wife, or a slave; whatever they may earn being regularly acquired for him, to whom they belong: whence it is the advice of Catyayana, not to lend any thing to women, slaves, or children.(2) Our own makes a similar provision; as did the Roman law also, namely, that the parent should have the benefit of his children's gains, while they live with him; being no more indeed than what nature and justice alike dictate, as a return for the maintenance and protection they enjoy, under the paternal roof. But, as it has been seen, that a Hindu wife has independant property peculiar to her,(3) so, with regard as well to the son, as the slave, the position of Menu is to be taken, as it purports indeed, to be only a general one, not intended to negative special rights; and, as the general principle of the Roman law, in this respect, was, in effect, almost superseded by its doctrine of *peculium*, (a fiction, entitling the son to whatever he might acquire by a variety of means, civil, as well as military,) so does the Hindu principle admit of a similar modification; the position, that a father is proprietor, and master of the acquisitions of his sons, as a universal one, having been negatived, in cases, where it appeared that those acquisitions had been made distinct and independant, as well of the father personally, as of any property belonging to him.(4) Of such acquisitions Menu reckons up seven distinct means,

(1) Menu, ch. VIII. 416 Nareda, 2 Dig. 249 3 Id 70
(2) 1 Dig. 16.
(3) Ante, p. 25.
(4) Soobun's Lal v. Hurbuns Lal, Peng. Rep. 1805. p. 7
Brij. Retun Das v. Brij. Pal Das, Id 1807. p 105.
2 Dig. 544, 545.

accounted *virtuous;* by which is to be understood, competent to a Brahmin;(1) to the extent of which, what a son has acquired, by his own unassisted exertions, he may give away;(2) implying that it is his. The principle is applicable to the other castes, according to the respective modes, by which they also may become possessed of property;(3) the consistency of which, in the case of sons, is argued from the rites prescribed to them by religion, inducing a greater or less expense; to the performance of which, therefore, in every instance, property is indispensable.(4)

II. As to the power of the father over the persons of his children, he has the ordinary one of moderate correction,(5) with the extraordinary one of selling them;(6) if, by that, more be meant, than the power that existed by the ancient law, of selling a son for adoption by the purchaser.(7) That the Hindus are in the practice of selling their children, particularly in seasons of distress, (which was the plea with the Romans also,) is certain;(8) as well as that there are texts to warrant it; though not one that does not stipulate, as essential to the validity of the sale, not only the existence of distress, but assent also of the party interested: without the concurrence of both, by some texts it is

(1) Menu, ch. X. 115. Nareda, 2 Dig. 139 Post, p. 308.
(2) 3 Dig. 156. 544.
(3) Menu, ch. X. 116. Id. 74, et seq. 2 Dig. 136.
(4) Jim. Vah. ch. I. 17. 3 Dig. 71.
(5) Menu, 2 Dig. 209. Id. ch. XI. 35.
(6) 3 Dig. 55. Post, ch. VI. p. 127.
(7) Ante, p. 90.
(8) Post, p. 131.

forbidden; upon which it is said that, though prohibited, the sale is not therefore void, according to the distinction prevalent in the Bengal school; (1)—but Yajnyawalcya, whose doctrines prevail to the southward, declaring the power that distress gives to the head of a family, in alienating its property, excepts the *son*, as well as the *wife*, from its operation;(2) and we have the authority of Sir W. Jones for an order of the Bengal government against it; purporting to have been made after consultation with the most respectable Hindus on the spot, "who condemned such a "traffic, as repugnant to their Sastra."(3)

III. The reciprocal duties of parent and child are sufficiently obvious, consisting in general of protection on the one hand, and of submission and reverence, including also protection, (where it may become necessary,) on the other. Protection implies maintenance, the obligation to which, as between parent and child, is eventually mutual; it being equally incumbent on sons, to take care that their parent shall not want, as it is on the latter to provide for his children. Maintenance by a man of his dependants is, with the Hindus, a primary duty. They hold that he must be just, before he is generous, his charity beginning at home; and that even *sacrifice* is mockery, if to the injury of those whom he is bound to maintain. (4) Nor of his duty in this respect are his children the only objects,

(1) Catyayana, Datt. Mim. sect. iv. 47. 2 Dig. 105.
(2) 2 Dig. 128. Id. 353.
(3) Charge to the Grand Jury of Calcutta, delivered by Sir William Jones, June 10, 1785. See his Works.
(4) Menu, ch. XI. 9, 10.

co-extensive as it is with his family, whatever be its number, as consisting of other relations and connexions, including (it may be) illegitimate offspring.(1) It extends to the outcaste, if not to the adulterous wife; not to mention such as are excluded from the inheritance, whether through their fault, or their misfortune; all being entitled to be maintained with food and raiment at least, under the severest sanctions. (2) A benevolent injunction! existing at no time ever to the same extent under our own law; which professes little of the kind, since the time that it has been competent with us for a man to dispose by will of the whole of his property, real and personal, without regard to the natural claims of wife and issue, to say nothing of more distant ties; a latitude, not approved by the author of the Commentaries, who, in noticing the power of the parent so to disinherit his children, thought it had not been amiss, if he had been bound to leave them at least a necessary subsistence; (3)—or, as the same sentiment has been expressed, in their peculiar manner, by the highest Hindu authorities, "Who leaves his family "naked and unfed, may taste honey at first, but shall af- "terwards find it poison." (4) The obligation extends, under particular circumstances, to responsibility for each others' debts, in a degree unknown to our law, as will be subsequently seen. (5)

(1) Post, p. 101.
(2) Menu, ch. IX. 202. 3 Dig. 320
Mit. on Inh. ch. II. sect. x. 1. 5. 12—15.
Jim. Vah. ch V. 11, excepts the outcaste. Post, ch. X. p. 231, et seq.
(3) Blackst. Comm. vol. i. p 450, 12th edit 8vo.
(4) Vrihaspati, 2 Dig. 131. Menu, ch. XI 9.
(5) Post, p. 120. 227. Append. p. 223.—C. 349.—C. 348.—E.

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The providence of the law thus including such children as are illegitimate, it is proper here to consider these. An illegitimate child may be described to be the offspring of a woman, not legally married to the putative father; as, where the man and woman are descended from the same stock, or, where the marriage has not been according to the order of class.(1) But it has been contended, that illegitimacy can only result from an irregular intercourse with a *Sudra* woman; and that, as between a man and a virgin of the *same caste*, the act of connexion is equivalent to the ceremonies of marriage;(2) of which a *Gandharva* marriage is referred to as a proof.(3) It is the sixth in the order of marriages, and the second of the base forms, permitted anciently for the military; being described as "contracted "for the purpose of amorous embraces, and proceeding "from sensual gratification;"(4) whereas, the first legitimate marriage of every Hindu is presumed to originate, and proceed, from a sense of duty.(5) But, admitting the loose principle of the *Gandharva* marriage, (subsisting in practice, though disapproved,) (6) it does not establish the position, for which it is adduced; since, even for it, nuptial rites are necessary.(7) It is true, that the

(1) Ante, p. 38. 40. Menu, ch. III. 4, 5.
Catyayana, 3 Dig. 325. 327. 330.
(2) Append. p. 195.—E.
(3) Append. p. 199.—E.
(4) Menu, ch. III. 21 26. 32. Yajnyawalcya, 3 Dig. 604.
Ante, ch. II p. 41.
(5) 2 Dig 409. Ante, p. 55.
(6) 3 Dig. 606.
(7) Devala, 3 Dig. 606

law, in providing for illegitimate children, seems to have had in contemplation only the Sudra class:(1) and it has arisen probably from the contempt in which this is held by it, that, as among Sudras, it makes comparatively but little difference, whether the offspring be legitimate, or illegitimate; the latter, as well as the former, being admissible to shares, on partition by the father; and to the inheritance, on his death;—only not to the same extent with his lawful sons, born in wedlock, and liable to be postponed to legitimate daughters and their sons.(2) And, nothing appearing to the contrary, it is to be inferred, that where illegitimate sons succeed to their father, the brothers, though illegitimate, will succeed to each other, living and dying undivided. Whereas, by our law, a bastard can *acquire* only; he cannot *inherit* from any one. The fruit of any other connexion with a Sudra woman, than that of a man of her own class, must necessarily be illegitimate, marriage between individuals of different tribes being legally impossible; and, how despicably such progeny was regarded, in ancient times, may be learnt from Menu, who describes it as "a corpse, "though alive;"—and "thence called in law, a living "corpse;"(3) the reason assigned for which is, that, though such a son confers some benefit on his supposed father, it is but inconsiderable.(4) It is of such offspring by "a man

(1) Mit. on Inh. ch. I. sect. xii.

(2) Mit. on Inh. ch. I. sect. xii.
Jim. Vah. ch. IX. 29, et seq. Post, p. 153.
Datt. Chandr. sect. v. 30, et seq. Append. p. 108.—C.

(3) Menu, ch. IX. 178.

(4) 3 Dig. 144.

"of the *priestly* class," that this is predicated by Menu; but the Mitacshara speaks of it as "by a man of a *regenerate* "tribe" generally;(1) and "a man of the priestly class," in the text of Menu, is expressly said to signify a *Brahmana, Cshatrya*, or *Vaisya*.(2) That a progeny, so estimated, should be barely admissible to the benefit of simple maintenance, and this too depending on the *docility* of the claimant,(3) cannot be wondered at. The inconvenience, arising from so indefinite a condition, is well obviated by a sensible living expositor, who observes that "a court would "presume a natural son qualified to receive maintenance, "unless the opposing party could shew what, in the con-"templation of the law, is a legal disqualification."(4) It is clear however, that, as illegitimacy exists among Sudras, so neither is it confined to that class; the difference being, that, in the regenerated tribes generally, its claim at the present day is to maintenance only, unless where custom has perpetuated to it rights of inheritance, such as subsisted under the ancient law, become, to the subject at large, long since obsolete.(5) Nor are authorities wanting, that assign to the mothers of such children the like provision.(6)

IV. With respect to the relation of *guardian* and *ward*, the King, as he is, by the Hindu law, failing all

(1) Mit. on Inh. ch. I. sect. xii 3.
(2) 3 Dig. 284, and ante, p. 39. note
(3) Mit. on Inh. ch I. sect xii. 3.
(4) Append p. 201.—S.
(5) Mohun Sing v. Chumun Rai, Beng. Rep. ante 1805. p 30.
(6) Jim. Vah. ch. XI. sect. i. 48, et seq.
Mit on Inh. ch. II. sect. i. 7. 20. 28.

others, the ultimate heir of all, Brahmins excepted,(1) so is he, to an extent beyond what is recognized by us in our Court of Chancery, the universal superintendant of those, who cannot take care of themselves. In this capacity, it rests with him, *i. e.* with the judicial power, exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations; preferring always the paternal male kindred to a maternal ancestor, or female.(2) It is stated that, in practice, the mother is the guardian;(3) but, as a Hindu widow is herself liable to the same sort of tutelage,(4) it is more correct to regard her as proper, if capable, to be consulted on the appointment of one;—and, if of competent understanding, the concurrence of the minor himself is not to be disregarded;(5) all which only shews how much the choice is a matter of sound discretion. Belonging to any of the three superior classes, the youth ceases to be in ward upon his ending his studentship, and returning home from his preceptor; if a Sudra, upon his completing his sixteenth year.(6) During his minority, he may sue, or defend by his guardian,(7) who, for abuse of his trust, is removeable.(8)

(1) Post, p. 170.
(2) Menu, ch. VIII. 27. 3 Dig. 542, et seq. Append. p. 202. 204, 205.—C. The same to Ch. x. p. 362.—C.
(3) 3 Dig. 544.
(4) Post, p. 212.
(5) 2 Dig, p. 543.
(6) Menu, ch. VIII. 27. 1 Dig. 293. Append. p. 206. 208.
(7) Append. p. 209, 210, 211.
(8) Append to ch. IX. p.

CHAP. V.

THE SAME SUBJECT CONTINUED.

It results from the interest that sons, under the Hindu law, possess in the family property, that, in some circumstances, a partition of it may be enforced by them in the life of the father;—while it is, generally speaking, of course always competent to him to divide it with them, if he will;—subject to the interposition of the law, even in such case, to regulate, and where necessary, restrain the exercise of this discretion. It becomes fit, therefore, to collect and exhibit the provisions it has made for the purpose in either case, however rare the practice may have become; more especially as they serve to illustrate partition among collaterals, which is in daily use.(1)

Partition, in its most general sense, comprehending, as well the division of the paternal property during the life of the father, as that which usually takes place, at some period or other, among coheirs, is the adjusting, by distribution, the possession of different parties to a pre-existing right;(2) as the divesting of exclusive rights in specific portions of property, and re-vesting a common one over the whole, is im-

(1) Post, p. 184.

(2) Jim. Vah. ch. XI. sect. i. 26.
Mit. on Inh. ch. I. sect. i. 4. note.

plied in reunion.(1) Whether it occur during the life, or not till after the death of the owner, in either case, it is founded on a claim of succession, originating in birth: inchoate and contingent during the life of the father; and, generally speaking, certain and indefeasible, upon his death. The contingency upon which it depends during his life, is of two kinds; either his will, that it should so take place; or the extinction of his own right in it, in point of law, by means remaining to be stated; in which latter case, the right of the sons becomes absolute, the same as if he were dead.(2) Upon these considerations, the writers on Hindu law discuss it under the head of inheritance; with which it is so far connected, that it follows of course, at the option of parties, after the succession has once vested by the death of the prior owner, and of which it is a sort of anticipation, when it takes place in his lifetime. It is the first branch of it that is proposed to be investigated in the present chapter; the second, or partition among co-heirs, succeeding, in the natural order of things, the chapter on inheritance.

The inchoate right that has been alluded to renders the sons, as has been seen, in some sort, co-proprietors with the father of the family property;(3) to the extent of giving them, under particular circumstances, claims upon it in his life, which, consistently with the spirit and intention of the law, it is not in his power altogether to bar.

(1) Mit. on Inh. ch. I. sect. i. 4, and note.
Jim. Vah. note to ch. XII. 1.

(2) Gautama: cited in Mit. on Inh. ch. I. sect. i. 23, compared with note to Jim. Vah. ch. I. § 19.—Also Id. § 31.

(3) Ante, p. 15, et seq.—and Append. p. 213.—C.

Vesting in them however by birth,(1) they attach more upon that part of it that has been inherited by him, than upon what he may have himself acquired; the title to property descended from ancestors being considered to be in him and them, so far the same,(2) that, upon partition by him taking place, the law regulates the distribution; whereas, with regard to the rest of what he possesses, it leaves it more at his discretion. This distinction, with whatever other peculiarity belongs to the subject, will appear on investigating it under the following heads, viz.:—I. *When* partition takes place in the life of the father. II. *Among whom*. III. *How*.

I. Upon the first point, various opinions exist, according to which the number of periods is differently assigned, by different writers, for the attaching of the claim in question in sons. Most of them include, and all imply, the natural demise of the father, as one; but this is an occasion of inheritance, not necessarily of partition, as has been properly remarked. (3) Omitting this, therefore, as one, the simplest, and perhaps the most tenable position on the subject is, that independently of the case of his natural death, it attaches *with* his consent; or *without* it, under some one or other of the circumstances hereafter mentioned, subject to the remarks accompanying their enumeration. Whatever might be

(1) Mit. on Inh. ch. I. sect. i. § 23. 27.
(2) Jim. Vah. ch. II. § 15, et seq. Mit. on Inh. ch. I. sect. ii. § 6. Id. sect. v. §. 3.
(3) Viramitrodaya. Note to Mit. on Inh. ch. I. sect. [illegible]

the case among the Hebrews, no Hindu can, according to the law, as it prevails in the Bengal provinces, under any circumstances, say to his father, in the peremptory language of the prodigal, "Father, give me the portion of goods that falleth to me."(1) The father may abdicate in favour of one, or of all, according to the limits imposed upon him by the law, if he thinks proper; but, with the exception of two cases, partition among the Hindus, in the lifetime of the father, whether of ancestral, or acquired property, would seem to be at his will, not at the option of his sons; (2) the excepted cases being, that of his civil death, *by entering into a religious order*, and that of *degradation*, working a forfeiture of civil rights. And, even with regard to these, it is not the will of the sons that operates, but the law; which, in favour of the title by birth, casts upon them the succession, before the arrival of the time for its regular devolution, by the natural death of the parent. A text indeed of Menu (3) (already cited) is referred to,(4) as shewing, that, of ancestral property, belonging to the father, the sons may at their pleasure exact a division of him, however reluctant; and it is true, (as has been already intimated,) that their claim upon property descended is stronger than upon what has been otherwise acquired; but the inference, drawn

(1) Post, p. 112.

(2) Menu, IX. 104. Sancha and Lichita, 2 Dig. 533. 536. Nareda. Vyasa, 3 Dig. 35. Gautama, 2 Dig. 535. Baudhayana, Id. 536. Jim. Vah. ch. II. § 8. Mit. on Inh. ch. I. sect. ii. Append. p. 216 to 219.

(3) Menu, IX. 209.

(4) Mit. on Inh. ch. I. sect. v. § 11.

in the Mitacshara, is at variance with the current of authorities, including Menu himself;(1) whose obvious meaning, in the text referred to, is simply, that ancestral property *recovered*, without the use of the patrimony, classes, upon partition, with property *acquired*. Not to mention, that the text in question is differently rendered in the translation we have of the "Institutes," by Sir William Jones;(2) in which it has nothing to do with partition by the father, but regards partition among brothers after his death. Moreover, Jagannatha, in his Digest, virtually negatives the inference deduced from it, and other correspondent texts, which he examines; concluding that, if it be against the father's inclination, partition, even of wealth inherited from the grandfather, shall not be made. (3) It is said farther in the Digest,(4) that, of patrimony inherited, a partition may be obtained from the father by application to the king, in case of oppression by a step-mother; but, as to the kind and degree that may suffice to warrant such an interference, the author is silent. The position is not supported by any thing to be found in the Daya Bhaga of Jimuta Vahana, or in the Mitacshara; and the compiler's authority is not, of itself, sufficient to establish one of so questionable a nature. Other periods indicated, are, the extinction of the father's pas-

(1) Menu, IX. 104.

(2) Menu, ch. IX. 209. But, according to Mr. Colebrooke, the version by Sir W. J. is from the context, and not literal. See note to 3 Dig. 34.

(3) 3 Dig. 45.

(4) 3 Dig. 47.

sions, or the arrival of the time for the mother to be past child-bearing, the sisters also being married; when, according to Nareda and others, partition of ancestral property may be exacted by the sons, in opposition to the father.(1) The marriage of sisters is confessedly mentioned as a circumstance only that should precede, but not as conducing in any degree to accelerate, partition. (2) With respect to the doctrine, as regarding the period when an increase of family is no longer to be expected, it does not appear to be generally adopted, except where this state of things may have determined the father to retire from the world and its concerns altogether; a measure that is admitted, on all hands, to constitute a ground for their claims being realized.(3) But, though the expiration of the time for child-bearing may not enable them to enforce a partition, which the father is not prepared to concede,(4) it is, in regard to ancestral property, held by the founder of the Eastern school of law, supported by his commentator Sricrishna, as well as by Raghunandana, that it cannot take place even *with* the father's consent, while the wife continues capable of being a mother; it being required that, to the will of the father to make it, there be joined the mother's incapacity to bear more children,—on the ground, that future issue, have, by birth, a special in-

(1) Jim. Vah. ch. I. § 32. 34.
Mit. on Inh. ch. I. sect. ii. § 7. 3 Dig. 48.
(2) Jim. Vah. ch. I. § 47.—3 Dig. 52.
(3) Jim. Vah. ch. I. § 39, and note.
(4) Jim. Vah. ch. II. III.

terest in property of the father, that has descended.(1) The possibility, however, of its so happening, has led to a provision, in that event, for after-born sons;(2) different opinions existing, whether it be to be supplied by the father, or by the brothers who have received their shares. Upon which it is said, that, where pregnancy is apparent at the time, either the partition should wait, or a share be set apart, to abide the event: but that, if it were then neither manifest, nor apprehended, in such case, should a son *who was at the time in the womb*, be born after, he should obtain his share from his brothers, by contribution; while a *subsequently begotten* one shall have recourse only to the remaining property of the father; succeeding to the whole exclusively, or dividing it with such of the brothers as may have become reunited to the common parent; any acquisition by a reunited father, through means of his individual wealth, or personal exertions, belonging exclusively to the son, born after partition, and not to him in common with another reunited. And, where there is no after-born issue, the sons, who had received their shares, take by inheritance what their parents leave.(2)

(1) Nareda, 2 Dig. 113. 3 Id. 50.
Jim. Vah. ch. I. § 45. Id. ch. II. § 1. and note. § 7. 33. and note to § 34.
Sricrishna, note to Id. ch. I. § 50.
Balambhatta, note to Mit. on Inh. ch. I. sect. ii. § 7.
Append. p. 220, 221. 213.—C.—S.

(2) Menu, ch. IX. 216. 3 Dig. 50. Id. 434 to 439.
Mit. on Inh. ch. I. sect. vi. 2. 16.
Daya Crama Sangraha, ch. V. 10, et seq.

The objection arising from the competency of the wife to continue bearing children, applies equally to a second, whom the father may have at one and the same time; the providence of the law having regard to the interests of sons generally, so they be sons of the same father.(1) Upon this principle it is said, that where sons apply to the king for partition, he must first inquire whether the mother be past child-bearing;(2) and the same reservation is inculcated, where it attaches upon the father retiring with his wife, as a devotee, to the wilderness.(3) Adverting to the various opinions that have been entertained on the question, the practical difference among them (says an eminent commentator) regards chiefly the cases of vice and profligacy, with lasting disease, and consequent disqualification, and incapacity; subjoining, however, that, without consent of the head of the family, it is not in such cases allowed by the prevalent authorities of Bengal, unless the vice or disease be such, as to induce degradation from caste. (4) If, in any case, as in that of the protracted absence of the father from home,(5) there should arise a question of *management*, defeasible on his return, or recovery, whichever of the sons is the most conversant with business, is the proper one to interfere on the occasion; not primogeniture, but capacity being, for this purpose, considered as affording the best rule in a family;

(1) Notes to Jim. Vah. ch. I. 45. and ch. II. 1.
(2) 3 Dig. 51. Ante, p. 109.
(3) Note to Jim. Vah. ch. I. 39.
(4) Mr. Colebrooke, in MSS. penes me.
(5) Harita, 2 Dig. 527. Beng. Rep. ante 1805. p. 96.

though, other things being equal, the elder has undoubtedly the preferable title.(1)

In the provinces dependant on the government of Madras, and elsewhere in the peninsula, the right of the son to exact partition of ancestral property, independant of the will of the father, appears authorized, but not without the existence of circumstances to warrant the measure; such as the father having become superannuated, and the mother past child-bearing; the sisters also married.(2) And there are two occasions, upon either of which, wherever the Hindu law prevails, dominion may be transferred from the father in his life, without his consent, whether the property claimed by the sons to be divided be ancestral, or acquired. These are, voluntary *devotion*, by which the father is considered as having renounced it, and *degradation* from caste, by which it is forfeited. Upon these it will be proper for a moment to dwell; taking *degradation* first.

It is to be remembered that, by our own law, as old as the time of the Saxons, property is, with us, forfeited by crime; as, by the feudal law also, as introduced among us at the Conquest, it escheats for the same cause, on attainder. Degradation from caste, by the Hindu law, answers to attainder by ours;(3) except that, under the former, instead of either the king, or the lord taking, the

(1) Post, p. 121. 176. Menu, ch. IX. 105, et seq.
2 Dig. 528. Sancha and Lichita, cited in Jim. Vah. ch. I. 42.
2 Dig. 533. Jim. Vah. ch. I. 37. 43.
Nareda, 2 Dig. 532. Append. p. 223.—C.

(2) Mit. on Inh ch I. sect. ii. 7. Id. v. 5.

(3) Jim. Vah. ch. I. 34. 41. 44.
Note to Mit. on Inh. ch. I. sect. ii. 7.
Devala, 2 Dig. 522.—Nareda, Id. 523.

succession, upon the delinquency of the owner being ascertained by sentence, vests in his heirs; as it does indeed with us after a time, under the law of escheats, where the superior efficacy of that of forfeiture to the crown does not intervene. Expiation obviates its effects, if made in time: but it comes too late to revest the property, after partition has taken place. (1) The subject will be resumed in a subsequent chapter;(2) it being sufficient to have thus briefly adverted to it here, as a cause, where it has been incurred by him, of partition, independant of his will, in the life of the father.

2. Another undoubted one, so far as it still subsists, is, what we should call his *entry into religion;* that is, his assumption of the one, or other, of two religious orders, by which a Hindu is accounted (as were monks, with us, before the Reformation) dead in law; the consequence also being the same, that his heirs take his estate. (3) They constitute the third and fourth stages, in the progressive advancement of the Hindu, from birth to death; the first being that of a *student;* the second, that of the married man, or *householder.* (4) In entering upon the third, (the first of the two in question,) viz. that of *hermit, (Vanaprasta,)* for which the appointed age is fifty, (5) he may repair to the lonely wood,

(1) Menu, ch. XI. 228. 1 Dig. 270. 288. 312.
2 Dig. 525, et seq.
(2) Ch. IX. p. 220.
(3) Harita, 2 Dig. 536.—Jim. Vah. ch. II. § 57.
Menu, ch. IV. 1. Id. VI. i. 33. 38.
Sidh Narain v. Futeh Narain; Beng. Rep. ante 1805. p. 36.
(4) Menu, VI. 87.—Note 60 to Datt. Mim. p. 22. Ante, p. 34. Note (1).
(5) Jim. Vah. ch. I. § 39.

accompanied by his wife, "if (says Menu) *she choose* "*to attend him.*" (1) And as, therefore, in such event, a prospect of future issue may still exist, partition will be premature, while it continues to do so, so far at least as regards property inherited, according to the authorities that have been already referred to. (2) The next is that of *Anchoret, (Sanyasi,* or *Yati,)* when there remains nothing to prevent it from immediately taking place. The nature and condition of these orders is fully explained by Menu, who has devoted a chapter to the subject; (3) and if, as would appear, that of the Anchoret was left at the beginning of the present *(Cali)* age subsisting, when that of the Hermit is said to have been abrogated, (4) it must have been upon the ground that retirement to the wilderness might, without material prejudice to the interests of life, be left open to the former, adverting to Menu's description of his frame, as by this time, "infested by age and sorrow, the seat of "malady, harassed with pains; such a mansion, in "short, of the vital soul, as the occupier may (be ex- "pected to) be ready always cheerfully to quit." (5) In either case, whether of the *outcaste*, or the *devotee*, partition attaches only upon property possessed by him at

(1) Menu, VI. 3.

(2) Of persons of this description in former times, the forests and wilds of the country were full, as appears by the beautiful drama of Sacontala; where, having abdicated the common intercourse of life, among the diversity of courts known to the Hindu law, one was specially provided for this ascetic community, called *aranya sabha;* from *aranya*, forest, and *sabha*, a court.

(3) Ch. VI.

(4) Nareda and Smriti. See general note at end of th[illegible] p. 364, 365.

(5) Menu, ch. VI. 17.

the time, not upon what may subsequently devolve, or be acquired. (1)

II. *Among whom it takes place.* The immediate objects of partition by the father are his sons. They alone can enforce it, in cases in which it is exigible by law. It is at their instance, and on their account only, that it is ever conceded by him. Under the ancient law, subsidiary ones participated, but not equally, with the legally begotten; as does still the son *given* in adoption, as well as any other competent in the present age to be adopted. (2) Where illegitimate issue would inherit, in case of the death of their putative father, they will have a claim to share on partition in his life; and they are, under other circumstances, entitled to be provided for, to the extent of maintenance. (3) A son, dying in the life of the father, leaving sons, representation takes place, proceeding as far as great grandsons; upon the ground of their conferring, by performance of funeral obsequies, equal benefit on the ancestor; (4) the *key* (as observed by Sir William Jones) (5) to the whole Indian law of inheritance. But, if one of the sons, absent at the time of partition in a foreign country, die leaving issue, their right survives to them as far as the seventh

(1) Vachespati Bhattacharya, 2 Dig. 525.
(2) 3 Dig. 176. 287. 290.
(3) Mit. on Inh. ch. I. sect. xii.
Daya Crama Sangraha, ch. VI. 32.
Mahabharata, 3 Dig. 115. Id. 140. Ante, p. 103.—Post, p. 233.
(4) 3 Dig. 7. 63. 65.
Daya Crama Sangraha, ch. I. sect. i. 3. Append. p. 224.
(5) Note to 3 Dig. 63.

generation; and, on their appearing, the brothers, who remained at home, and divided, (or their representatives,) must, to that extent, answer a claim out of their several shares. (1) The term generally mentioned, as constituting for this purpose length of absence, is twenty years; (2) though it is said in one place that, if no intelligence be received during twelve years, concerning a man who has travelled to a foreign country, the law requires his son to perform obsequies for him, presuming his death. (3) In determining what is, for this purpose, to be considered as a foreign country, various circumstances are to be attended to; such as difference of language, the intervention of a mountain or great river, and distance, as combined with one or more of the leading points; countries being accounted distant, whence intelligence is not received in ten nights. (4) The right of *after-born* sons has been already mentioned. (5) A *minor's* share should be secured for him. (6) The result of much discussion as to the interest that the *wife* has in partition by, or in the life of the husband, is, that it is incidental; it not being competent to her to claim it in her own right. (7) Being admitted to participate, she shares equally with the sons, account being taken of such separate property

(1) Vrihaspati, 3 Dig. 84. 440.
Jim. Vah. ch. VIII. Post, p. 146.—Append. p. 224.
(2) 1 Dig. 266—269.
(3) 1 Dig. 278. Post, p.
(4) *Vrihat* Menu, and Vrihaspati, 2 Dig. 29.
(5) Ante, p 111.
(6) Append. p. 225.—C.
(7) Apastamba, 3 Dig. 27. Id. 422—427.
Append. p 227

as she may possess, derived from, or through her husband; (1) and allowing her, according to some authorities, certain appropriate deductions of furniture, ornaments, and the like. (2) Where she does not participate, she is to depend upon the reservation to be made by her husband, for himself, and the remaining members of his family; which, with reference to property acquired by him, may be to any extent that he may deem expedient. (3) The allotment of a share to her, where it takes place, does not imply separation: so far from it, that the text, declaring partition not to obtain between a wife and her lord, (4) has been in modern times construed as importing a denial of their dis-union, as a thing altogether incompetent. (5) And accordingly, whether she take her several share on the occasion, or a reserved portion out of the property retained, for that and other purposes, by her husband, the law supposes the conjugal intercourse to remain, after partition among sons. Her share, if assigned to her, being in the nature of alimony, and differing in point of title from her *Stridhana*, or what is emphatically called the *peculiar property of a woman*, is resumeable, if necessary, by her husband. (6) Where there

(1) Jim. Vah. ch. III. 31.—Mit. on Inh. ch. I. sect. ii. 8, 9.
Id. sect. vii. 1.—Post, ch. X. p. 231.
Yajnyawalcya, 3 Dig. 11, et seq. Id. 19, et seq. 1 Dig. 231.
Daya Crama Sangraha, ch. VI. 22—27.

(2) Apastamba, 3 Dig. 26.
Mit. on Inh. ch. I. sect. ii. 10, and sect. iii. 6.

(3) 3 Dig. 30.

(4) Apastamba, 3 Dig. 27.

(5) 3 Dig. 426, 427.

(6) 3 Dig. 22—27. Id. 72. 427.
Jim. Vah. ch. II. § 57.

are several wives, they share equally.(1) *Wives of the paternal grandfather* have the same claim with the father's.(2) *Daughters* take nothing, as of right, during their father's life.(3)

III. As to the *mode of partition*, and the *assignment of shares*. It may be made openly in the presence of arbitrators; privately, by adjustment;(4) and a third method of ascertaining a separate title is, by casting of lots;(5) upon which it may be remarked, that the above are precisely three, out of the four, enumerated by our Littleton, as the modes of partition among sisters, (coparceners,) at the English common law; the fourth being only a modification of the one by private agreement,—when, it having been settled that the eldest shall make it, she chooses last, according to an established rule, *Cujus est divisio, alterius est electio.* Of what antiquity in the East is partition by lot, appears from its having been the way, by which the land of Canaan was to be divided among the tribes, and people of Israel.(6) Pre-

(1) Yajnyawalcya, 3 Dig. 11. 18, et seq.
Mit. on Inh. ch. I. sect. ii. 8, 9.

(2) Vyasa, 3 Dig. 12. Id. 24.

(3) Mit. on Inh. ch. I. sect. vii. § 14.
Nareda, 3 Dig. 18. Id. 52.

(4) Sancha and Lichita, 2 Dig. 536. And see Post, ch. VII. p.

(5) ? Dig. 505. 518. Jim. Vah. ch. I. § 8. note.

(6) Numb. ch. XXVI. v. 54, 55. XXXIII. 54; and Josh. ch. XVIII. 10. As a matter of curiosity, the following is, according to Littleton, the method in England of partition by *lot*. Partition being made, each separate part of the land is written on a little scroll, which is covered with wax in form of a ball, so that the scroll cannot be seen; when all the balls are put into a hat, to be kept in the hands of an indifferent person; after which, the eldest daughter draws first, and the rest according to their seniority.—*Allnatt*, p. 15.

vious however to partition, debts must be provided for, by such means as may be agreed at the time; since, taking place in the life of the father, it must be looked upon as an anticipated descent of his property; and, as the property of one deceased may be pursued by his creditors, into whatsoever hands it comes,(1) it follows that the sons, among whom it is divided, must, at all events, be liable, to the extent of the shares assigned them; under the general responsibility of the descendant for the debt of his ancestor, subject to any arrangement for payment, to which the creditors have been parties.(2) But, for a debt incurred by a disunited father, an after-born son is exclusively liable, unless it was contracted, not on his own account alone, but for the benefit of the family, subsequently to re-union; in which case it is eventually a charge, as well upon the re-united parceners, as upon sons born after partition.(3) Where there are outstanding debts, both of father and grandfather, with assets of each, they may be distributed; analogous to the practice in our Court of Chancery, of marshalling the assets.(4) And here it may be observed, that the son, living with the father, is liable for a debt contracted by him, upon the latter becoming afflicted with an incurable disease, the same as though he were dead; making it, by consequence, reasonable that, in such case, there should be in the son a right

(1) Note to 1 Dig 266.
(2) Jim. Vah. ch. I. § 48. Daya Crama Sangraha, ch. VIII. 26.
(3) Id. ch. V. 18, 19.
(4) 3 Dig. 74

of interference with the family property. (1) With respect to other charges upon the property, forming, with that of debt, the subject of a distinct chapter, (2) it need only be remarked here, that the father can retain for them; and that if, through degradation from caste, or otherwise, this should not be competent, they will remain to be provided for by the sons, as among brothers after the death of their father, out of the common stock. (3)

Partition being to be made, by the ancient law, whether it were by the father among his sons, or subsequently among brothers, the practice was, to begin with deductions of a twentieth to the eldest, a fortieth to the middlemost, and an eightieth to the youngest.(4) Different constructions occur, as to which was to be considered as the middlemost; one being, that it included all the intermediate ones, between the eldest and youngest; (5) another, that it meant the next after the eldest, those born subsequently being, according to this strange idea, all comprehended under the term, youngest.(6) Upon the former construction, a fortieth was given to each; unless they happened to be deficient in virtue, in which case, they had only a fortieth among them.(7)

(1) Catyayana, 1 Dig. 277. Append. 211.—C.
(2) Post, ch. X.
(3)
(4) Menu, ch. IX. 112. Mit. on Inh. ch. I. sect. III. § 3.
(5) Menu, ch. IX. 113. 2 Dig. 550.
(6) Sricrishna, note to Jim. Vah. ch. II. § 37.
(7) 2 Dig. 559.

The eldest had moreover a claim, not only to the best chattel, but, upon partition among brothers, to the best apartment of the house, the rest being distributable according to the pretensions of each.(1) But, to entitle him to these privileges, extraordinary merit was required to be combined with primogeniture, otherwise some trifle only was to be given him, to distinguish him as eldest.(2) The rules concerning these deductions varying, their diversity is endeavoured to be reconciled by the supposition of relative, and superior good qualities—a criterion of title admitted to depend upon reasoning, too subtle to be allowed much influence in the determination of civil rights.(3) Altogether obsolete as the pretension is, upon partition among brothers, and optional in any case on the part of the father in his lifetime, while he is restricted from acceding to it, where the property is hereditary, (4) the law upon it has become a matter of mere curiosity. Disregarding, therefore, all distinctions of the above kind, the general rule is, that it must be equal. It may, indeed, be so far partial, that (as in the instance of the prodigal son in the celebrated parable) any one son may, in exclusion of the rest, be its sole object, the property of the father with regard to the rest, and they also, remaining

(1) 2 Dig. 558

(2) Menu, ch. IX. 214, 215. 2 Dig. 551.

(3) 2 Dig. 548—587. 3 Id. 182. Ante, p. 87.

(4) Byroochund Rai v. Russoomunee; Beng. Rep. ante 1805. p. 29.
Id. p. 64.
Mit. on Inh. ch. I. sect. ii. §. 1. 6. Id. sect. iii. 4.
2 Dig. 565. 574. 587.—Aditya Purana, 5.
See general note, at the end of the translatio of Menu, p. 364.

as before;(1) it being certain that such one, upon whatever ground he separates, can only receive his due share; the rule alluded to (which is alike binding according to the doctrine of every school) being, that, as to such parts of it as have been inherited by the father, whether real or personal, land or moveables, the division must be strictly equal; while, with respect to that which is of his own acquisition, his sons co-operating, or not, it must be virtually so.(2) For, with regard to the latter, of which the shares are more in the discretion of the father, he is not at liberty to make distinctions upon improper grounds; as for instance, on behalf of the issue of a favourite wife, which was prohibited by the Jewish, as it is by the Hindu law;(3) preferences, as well as exclusions, requiring to be justified by circumstances, not being permitted to be indulged through caprice;(4)—just as, among the Romans, it was not competent to the parent to disinherit his child totally, without assigning sufficient reason for an act so contrary to nature: whereas, on the distribution of that which is ancestral, the Hindu father has no discretion at all.(5) And here it may be remembered, that, whatever may have been acquired by him,

(1) Daya Crama Sangraha, ch. VII. 13. Append. p. 217.—C. The same to ch. X. p. And to ch. XII. p.

(2) Menu, ch. IX. 215.
Jim. Vah. ch. II. 20. 50. 76. 86, note.
Daya Crama Sangraha, ch. VI. 19, 20.
Bhowannychurn B. v. Heirs of Ramkaunt B.; Beng. Rep. 1816. p. 562.
2 Dig. 544.

(3) Deut. ch. XXI. v. 16, 17. 2 Dig. 540. 3 Id. 2.
Daya Crama Sangraha, ch. VI. 11—15.

(4) Jim. Vah. ch. II. 74. 83, et seq. Mit. on Inh. ch. I. sect. ii. 14.
Catyayana, 2 Dig. 540, 3 Id. 2.

(5) Jim. Vah. ch. II. 50.

using the patrimony for the purpose, is construed as forming a part of what has descended; while, of that which is properly ancestral, any portions that, having been lost during the time of the ancestor, have been since recovered by his successor, without the use of the patrimony, are looked upon as acquired; and such augmentations are liable to be classed and treated accordingly on a partition.(1) So fixed are these principles, as applicable to the different sorts of property, that, if violated, and the departure from them not acquiesced in at the time, the proceeding may be disputed; the sons' joint ownership with the father being said to consist in the power of claiming partition, (*i. e.* as it must be understood, where it is by law claimable,) and in that of resisting an unequal one.(2) Where a share is not desired by a son, it may be effectually waved by his acceptance of a trifle in satisfaction, upon the principle of *quisque potest renunciare juri pro se introducto;* his heirs being bound by his consent.(3) But, without renunciation, it may be still claimed.(4) Nor is it necessary, where the partition is general, that it should attach upon the whole of the property; a part only may be distributed, keeping what remains for future division, or to descend in a course of inheritance.(5) With regard to the indivisibility of par-

(1) Ante, ch. I. p. 16.

(2) Mit. on Inh. ch. I. sect. II. 14. 3 Dig. 43. 45. 49. 67. Append. p. 225.—C.

(3) Menu, ch. IX. 207. Mit. on Inh. ch. I. sect. ii. § 11, 12. Yajnyawalcya, 3 Dig. 65.

(4) 3 Dig. 68.

(5) 2 Dig. 537.

ticular things, and the divisibility of others, but in a special way, the distinctions and differences involve a detail, which, as it would be tedious to repeat, so will it be best reserved for the chapter upon partition *among co-heirs*,(1) where questions of the kind are more likely to arise, than upon partition by the father, which, in the nature of the thing, can, comparatively speaking, so rarely occur; it being moreover declared, that the precepts concerning partition among brothers are to be observed as between a father and his sons, due attention being paid to circumstances, and in the absence of express texts of law.(2)

The shares of the sons being thus ordained to be, in general, equal, the father has a right to two for himself out of the ancestral property, the law, as to what he may otherwise have acquired, having left him free to part with as much, or as little of it in his life, as he pleases; retaining for himself, and the rest of his family, not receiving shares, whatever he may think proper;(3) with liberty, in case of indigence, to resume, what he may have so divided;(4) as the Roman law (observes a learned writer) indulged to every one who laid himself under a gratuitous obligation, the benefit of a competence, (*beneficium competentiæ*,) by which he might retain for himself so much as would be necessary for his subsistence, if, previous to the fulfilment of the obligation, he happened to be reduced to want.

(1) Post, ch. VIII. p. 184.
(2) 2 Dig. 185.
(3) Jim. Vah. ch. II. § 35, and note. Id. 47. 55. 75. et seq. Harita, 2 Dig. 586. 3 Id. 32. 34, et seq. Append. p. 229.—C.
(4) 3 Dig. 67.

Jagannatha, citing the Pracasa's exposition of a text of Menu, says, "Should any one of undivided brothers, "through laziness or knavery, make no exertion for gain, "not striving to improve the existing stock, and acquire "farther wealth, by agriculture, or the like, he may be "debarred from his share of that which has been added "by the rest of the brethren; subject to a trifle being "given him for his maintenance; and without prejudice "to his claim for a share of the original stock;"—a reasonable provision surely as against a *drone!* But the Southern Pundits deny this; they insist, that to the right of sharing there is no such exception; but that all participate equally, including such as may have done nothing toward improving the common stock; not admitting the power of driving

Ignavum fucos pecus a præsepibus.

And, for this, referring to the Mitacshara, they think the text of Menu (already cited) to be declaratory of the only case, in which a parcener may be excluded from his share, namely, with his consent.(1)

(1) Mit. on Inh. ch. I. sect. iv. 31. Menu, ch. IX. 207.

CHAP. VI.

ON SLAVERY.

WHEREVER, in Hindu law, land is spoken of, *slaves*, if not mentioned with it, are understood to be included, being regarded by it as real property; of course descendible, and otherwise transferable, and consequently connected with the two subjects of Inheritance and Contract, that have been specially committed to the King's Courts in India, by the Royal Charters; and entering as they do, into the composition of a Hindu family, this would appear to be as proper a place as any for considering the subject; which it is proposed to do by examining, First, the origin of slavery among the Hindus; Secondly, how far it is defeasible; Thirdly, the dominion of the master, or owner, while it continues, over the property and person of his slave.

1. To begin with its origin. It belongs not to this work to reprobate, as it deserves, the existence of slavery, by exposing and expatiating upon its horrors, necessary, or natural; the topic having been rendered trite, through the exertions of those, who have, in our own country and day, by their heaven-directed eloquence, effected so much toward the extinction of the iniquitous *traffic*, and (it is to be hoped also) *property* in them. And were the task to be here attempted, it were vain with reference

to India, unless the legislature could, with prudence, as well as propriety, interpose, to do away entirely, within the limits of its sovereignty, so great an abuse. Down to 1816, no case had arisen at Madras, to try the question on the principles of the English law; which, to a certain degree, prevails, even among the natives, at the several Presidencies. But it is to be remembered that, even there, by the charters alluded to, where the interest is entirely native, matters of *contract* and *inheritance*, covering a large field in the contemplation of Hindu slavery, are to be determined according to their own, not according to the English law. And, though there exist in India sources of slavery, other than the two alluded to, it is to be farther recollected, that the British statutes, upon which these charters are founded, preserve to the natives, not without some anxiety, "the rights and authorities of "fathers, and masters of families;"—of which latter, domestic slaves are undoubtedly members. This is supposing the question to have reference to the Presidencies alone; jurisdictions extremely limited, compared with the vast interior dependant upon them, left to the government of native law, unaffected by those statutes and charters. And though also, what was said so long ago as the time of our Elizabeth, is, in a legal sense, happily true, "that the "air of England is too pure for a slave to breathe in," it is not so, in a political sense, with that of India; the latter having been in all time, and essentially, a despotic country. Accordingly, that slavery obtains in it was, with all his dislike of the thing, and, however reluctantly, admitted by Sir William Jones, in one of his beautiful charges to the Grand Jury of

Calcutta, (already alluded to,)(1) commenting on the case of the death of a slave girl, beaten by her master; in his discourse upon which, it is perhaps to be wished, that an exalted zeal for the rights and happiness of his species, may not have led him to present too favourable a view of the condition, as it exists among the Hindus, *in point of law;*—too high wrought a picture of it, in point of misery, as represented by him, with reference to that town in *practice.* As contrasted with Sir William Jones's, the following succinct description, by Mr. Colebrooke, specifies, with accuracy, its origin, at the same time that it establishes its existence. "Slavery (says that learned "jurist(2)) is fully recognized in the Hindu law; and the "various modes by which a person becomes a slave, are "enumerated in passages which will be found quoted in "Jagannatha's Digest,(3) comprehending capture in war, "voluntary submission to it for divers causes; involuntary, as in payment of debt, or by way of punishment; "birth, or offspring of a female slave; and gift, sale, or "other transfer by a former owner." The authorities alluded to for the several sorts, according to their origin, are Menu and Nareda, of whom the former enumerates seven, the latter fifteen; the latter enumeration, however extended, with reference principally to the occasions of emancipation, being considered to be in effect, included in the former.(4) Referring to the latter, as being the

(1) Delivered June 10, 1785. See his Works.
(2) Append. p. 230.
(3) 2 Dig. 224, 228. Daya Crama Sangraha ch. XII. sect. i. 3, et seq.
(4) 2 Dig. 230.

most detailed, six out of the fifteen are by transfer, or derivative, which suppose pre-existing titles. Such are, the slave born of a female one in the house of her master, which supposes the slavery of the mother; the slave bought, received in donation, inherited, pledged by his owner, or won from another at play. Admitting slaves to be property, as much as cattle,(1) (a necessary concession, constituting the great objection to the existence of slavery,) that *partus sequitur ventrem*,(2) and that they descend, and may be transferred, (whatever may be thought of the unfeeling levity of making them a stake at play,) cannot be denied. Such, in general, is their state in our Western colonies, secured to purchasers and proprietors, by British acts of parliament; a condition of things, which, in the progress of events, seems likely to cure itself; extreme evil, by means however deplorable, often generating its own remedy. The question remains, as to the original title, how this is created?—According to Justinian, by two means only; viz. *jure gentium*, by captivity in war, and, *jure civile*, by contract;—titles that have been satisfactorily shewn to be untenable upon principle;(3) but this to little purpose, where the inquiry is, as to a fact of positive law. With regard to slavery, as arising from captivity in war, deep-rooted in the practice of ancient nations, the texts of Menu and Nareda concurring, the Hindu Digest records the speech

(1) Yajnyawalcya, 1 Dig. 113. Sulapani, Id. 114. Catyayana, Id. 151.

(2) Datt. Mim. ch. IV. 75, et seq.

(3) Blackst. Comm. vol. i. p. 423, 12th edit.

of one barbarian king to another, who had been recently vanquished by him, exemplifying, in a striking manner, the commutation of death for servitude. "Fool, "(says the conqueror to his captive), if thou desirest "life, hear from me the conditions: thou must declare "before a select assembly, and in the presence of the "multitude, 'I am thy slave.' On these terms I will "grant thee life."(1) If, under the Roman law, the title was only where one *sold* himself to another, according to the Hindu law, he who *sells* may *give;* nor is the sale or gift to be necessarily the act of him who is the object of the transfer, a right of transfer following the right of property.(2) Gift, and contract, therefore, by others as well as by the individual, are established titles, in daily use, particularly during famine, to which India is subject; and of slaves so transferred, persons, varying with the sex, are appointed for the examination.(3) In the Appendix, judicial instances are given of the practice at Broach, near Bombay.(4)—It had the sanction of Sir William Jones in his own person, as he tells his audience in his charge at Calcutta; where, according to the same authority, the sale of slaves was, in his time, as extensive and notorious, as that of any other commodity. And, though that eminent person professed to look upon those, which he possessed, in the same light with other *servants*, adding, that, whenever they should be old enough to comprehend the difference of the terms, he should certainly tell them

(1) 2 Dig. 226. Menu, ch. VII. 91.
(2) Append. p. 233.
(3) Yajnyawalcya, 2 Dig. 310. Nareda, Id. 315.
(4) Append. p. 233 to 237.

so, whereby he vindicated the humanity of his amiable character; the point is, whether, upon a return to a *Habeas Corpus*, stating either a purchase or a gift, according to the usage of the country, and consonantly with the authority of Menu and Nareda, he would have taken upon himself to have *released*.—Where the slavery is for a limited time, as in pledge for the payment of a debt, or in consideration of maintenance, (being two of the instances enumerated by Nareda,) the stipulation, creating it, is rather in the nature of a contract for service, as contradistinguished from slavery; which may be so just, that those bound by it seem to be improperly called slaves;(1) the only badge of their slavery being, the obligation they may be under, of performing servile work. That children are frequently stolen for the purpose of being sold, other than in the times of distress, may readily be believed. Of this description was stated to have been a large proportion of the boat loads, referred to by Sir William Jones, as coming continually down the Ganges, for sale at Calcutta; but that titles, so originating, could not stand for an instant exposure in a court of justice, need scarcely be added; abhorrent as the Hindu law is, (equally with any other whatever,) of force and fraud.(2) To this place is referable the instance already alluded to under another head,(3) of adoption by *purchase*, where, adoption failing, whether from defect of the

(1) Nareda, 2 Dig. 222.
(2) Nareda, 2 Dig. 239. Menu, ch. VIII. 165. 168. Append. p. 233. 235.—C.
(3) Ante, ch. III. p. 90. Append. to same, p. 111.

prescribed ceremonies, or other cause, a condition, not in contemplation of the parties, ensues. The child selected, not being able to return to his own family, his connexion with which is extinguished, and equally incapable of belonging, in the intended capacity of a son, to the one to which he has been so transferred, supposing the adoption not to be legal, he is said to become the *slave* of the adopter.(1) Such is the reasoning; and, admitting the conclusion, which, however, is disputed,(2) the rank of children, so becoming slaves, through failure in the requisites of adoption, has been assigned in the most favourable class, that of slaves maintained in consideration of service, who are entitled to their immediate release, on relinquishing the maintenance.(3) This is an instance in which slavery, if it legally ensues, may be said to *result;* but the same consequence does not follow, where the failure proceeds from the birth of a son, to the adopting father, subsequent to the adoption, as has already appeared.(4) Another special one is, where a man cohabits with, and much more where he marries the slave girl of another, whereby he becomes the slave of her owner; or, in the language of the law, "a slave for the sake "of his bride."(5) The converse of which holds; since, if a free woman marry a slave, she becomes the property of her husband's master. But the female slave of one,

(1) 3 Dig. 148, et seq. 226, 227. 251.
Datt. Mim. sect. iv. 22. 36. 39, 40. 46. Append. p. 230.—C.

(2) Mit. on Inh. note to ch. I. sect. xi. 13.
Mr. Sutherland's Synopsis, p. 217, and note xi. to Id. p. 225.

(3) Append. p. 232.—C. Qu. tamen; et vid. 2 Dig.

(4) Ante, p. 86.

(5) Nareda, 2 Dig.
Catvayana, Id.

marrying the male slave of another, remains the slave of her owner,—marriage not altering the property in her, unless consented to by her master; in which case it operates as a transfer of her, as slave, to her husband's master.(1) Slavery for this cause is considered as ranging under the head of *gift*, the party, in either case, acquiescing in the consequence.(2) It has been seen, in the preceding chapter,(3) that, upon a man's becoming a religious devotee, thus abdicating secular concerns, his property is divisible among his sons, by a sort of anticipated inheritance, as though he were dead; which he is, in effect, in law. Upon the assumption of such an order, respect may be entertained for the act, where it is seen to be sincere. For *apostacy* from it, the Hindu law makes no allowance; it operates as an exclusion from inheritance,(4) and, with reference to two of the superior classes, viz. the Cshatrya, and Vaisya, as a cause of servitude,—apostates, in either of these two classes, becoming, by their apostacy, slaves to any master, as may happen by agreement; and eventually to the king, as some atonement for their offence;(5) with this peculiarity, that they may be slaves in the inverse order of the classes, that is, to masters of a class inferior to their own; contrary to the general rule, which is against such a degradation in slavery, as it has been seen to be in mar-

(1) Catyayana, with the Commentary, 2 Dig. 252.
Daya Crama Sangraha, ch. XII. 7, et seq.
(2) 2 Dig. 230.
(3) Ante, ch. V. p. 114.
(4) Post, ch. IX. p. 225.
(5) Narada, 2 Dig. 224. Catyayana, Id. 227, 229.

riage.(1) Hence it appears, that slavery is not confined to the class of the Sudra.(2) The Brahmin, that highly privileged order, is indeed exempt from it; who therefore, if he apostatize, is to be banished;(3) being (says Dacsha) first caused by the King to be *lacerated by the feet of dogs.*(4) Were a Brahmin even willingly to become a slave, though, with regard to the individual, *volenti non fit injuria*, yet, upon general principles, it would be the duty of the state, feeling the indignity, to interpose to prevent him.(5) But neither can he be regularly employed in the performance of servile acts, or impure work, incompatible with the dignity of his order;(6) which, however, it seems, is not compromised by sweeping a temple, or accepting alms; and, with reference to which, he is even exhorted "to make no provision for the mor-" row."(7) The remaining cause of slavery to be noticed, is that of the non-payment of a fine, for which (according to the commentary of Menu(8)) the party is liable to loss of liberty, till it be acquitted, upon the common principle of *qui non luit in crumenâ, luat in corpore;* though extended in its operation, beyond what we are accustomed to. Here again the Brahmin has his privilege; the other orders, when unable to pay a fine, being doomed to dis-

(1) Nareda, 2 Dig. 253. Catyayana, Id. 254. Ante, ch. III. p. 88.
(2) Append. p. 232.—C.
(3) Catyayana, 2 Dig. 227.
(4) 2 Dig. 227.
(5) 2 Dig. 255.
(6) Menu, ch. IV. 15. Ch. VIII. 102.
(7) Menu, ch. IV. 3, et seq. Catyayana, 2 Dig. 255.
Vishnu, 2 Dig. 257. See as to this order however, Post, p. 308.
(8) Menu, ch. VIII. 413. 2 Dig. 229.

charge it by their labour; but "a priest (says Menu) "shall discharge it by little and little."(1) Of the various causes of slavery among the Hindus, thus enumerated, originating in captivity, in gift, in contract, or in punishment, the one considered to be the vilest, is where one *sells himself*,(2) the sole ground, (captivity excepted,) according to the civil law; but the Hindu law makes a reserve, where such sale is for a religious purpose; of which an instance is recorded of *Herischandra*, a celebrated monarch, who, having already divested himself of his entire property, in favour of the holy sage *Visvamitra*, became the slave of a *Chandala*, (one of the very lowest tribes,) for the payment of a sacrificial fee.(3)

2. Of the slave born, of those acquired by purchase, by gift, or by inheritance, the servitude is permanent and hereditary, releasable by death only, not being by the act of the slave; for, where it is, the suicide, according to the religious notions of the natives, remains the slave of the same master in another birth;(4) a fancy, that may serve to illustrate his hopeless condition in this life, from which, as it appears, he can by no means of his own escape. To this however there is an exception, where the life of the master, being in imminent peril, is saved by his slave, but, with this qualification, that, to render such service a title to release, the exertion for the purpose must have been at the risk of the slave's own; for otherwise, it

(1) Menu, ch. IX. 229. 2 Dig. 229. 1 Id. 349.
(2) Nareda, 2 Dig. 231.
(3) 2 Dig. 232
(4) 2 Dig. 232. Post p. 215

would be but in course, that he should do every thing in his power, to save his master's, being in danger.(1) Another exception is, where the owner, cohabiting with his slave girl, she bear him a son, he not having at the time any other, legitimate or adopted; in which case, she and her issue are enfranchised:(2)—and a humane provision denies to him, except in distress, the right to dispose of his female slave to another, she resisting the sale; unless she have forfeited the benefit of it by her viciousness.(3) It is to be observed, however, that, of these propositions the Southern Pandits, who have been consulted upon them, have no other authorities to refer to in their support, than those furnished by Jagannatha, which are principally applicable to the Bengal provinces; and, independant of them, it may be a question, whether, in the case of purchase, gift, or inheritance, the permanency of the slavery so created, may not depend on the original condition of the particular slave, as having been one beyond redemption, or not: so as to resolve itself into the proposition, that the slave by birth is the only irredeemable one. Of the rest, the slavery is, by various means, defeasable, independant of the will of the owner; the captive taken in war, the slave won at play, and the one *self*-given, being redeemable, on finding a substitute.(4) With regard to the slave for a stipulated time, he ceases to be so, on the term of his servitude expiring;(5) and he, whom love has enchained

(1) Nareda, 2 Dig. 241. Yajnyawalcya, Id. 245. Append. p.
(2) Catyayana, 2 Dig. 247. Vid. tam. Datt. Mim. sect. iv. 75, et seq.
(3) Catyayana, 2 Dig. 258, 259.
(4) Nareda, 2 Dig. 246. Daya Crama Sangraha, ch. XII. sect. ii.
(5) Nareda, 2 Dig. 245. [illegible] p. 239.

in a double captivity, becomes free again by discontinuing his commerce, and withdrawing from the object of his passion.(1) For the remaining ones, whose bonds are not permanent, they may recover their freedom by payment, where their servitude is for a debt, or fine; by compensation, where it has been for maintenance.(2) For, though the gains of a slave, while he continues so, vest in his owner; yet, if he be incapable by other means of property applicable to his redemption, he may at all events be redeemed by the aid of friends.(3) The slave pledged for debt remains the property of his original owner, redeemable till the time for payment be passed, when the property is altered, vesting in the mortgagee, in the nature of a slave bought; and, as such, irredeemable, if the title pledged was an absolute one.(4) While the servitude continues, a slave quitting his owner may be reclaimed;(5) and a text of Menu, confined indeed to the Sudra, is considered as warranting the position, that a slave, emancipated by his master, received by another, and emancipated by him, may be re-seized by his former owner; but this would be contrary to principle; and the fairer construction of it is the obvious one, that his emancipation leaves him still a Sudra, liable of course to all the duties of his class, being essentially servile.(6) The form of ma-

(1) Nareda, 2 Dig. 247.
(2) Yajnyawalcya, 2 Dig. 245. Nareda, 2 Dig. 243. 245. Append. p. 234 to 237.—C.
(3) Catyayana, 2 Dig. 252. Colebr. on Obligations, p. 232.
(4) Nareda, 2 Dig. 245. Append. p. 235.—C.
(5) Nareda, 2 Dig. 237. Append. p. 238.—C.
(6) Menu, VIII. 413, 414. 2 Dig. 232. 238.

numission is, by the master taking a pot of water from his shoulder, and breaking it with appropriate ceremonies; upon which the slave becomes free.(1)

3. As to the dominion of the master, first, over the *property* of the slave; it is certain that the latter can acquire only for the benefit of his master; possessing his person, he possesses every thing that can relate to it; nor can the slave have any property, that he can call his own, but by his master's consent.(2) Secondly, with regard to his *person;* that the owner has the same power of correcting his slave, that belongs to a master over his servant, is implied, for he is one of the most abject kind; and a runaway slave is reclaimable.(3) But, if a slave pledged refuse to work, complaint should be made to his owner, who must assign the pledgee another; such slave, while in the possession of the latter, not being liable to be beaten by him.(4) That the master has power over his slave's life, no where appears; and here, construing "servant," in the text cited from Menu, to comprehend *slave*, that great legislator and Sir William Jones are agreed that, in the exercise of such power over him, as by law he has, it is at his peril, if it be immoderate, according to the consequences that may ensue.(5) But, with the exception stated, it is competent to him to com-

(1) Nareda, 2 Dig. 248.
(2) Menu, VIII. 416, 417. Nareda, 2 Dig 237. 249. 1 Dig. 16. Catyayana, 2 Id. 252.
(3) Nareda, 2 Dig. 237. Append. p. 316.
(4) Catyayana, 1 Dig. 153, and Comment.
(5) Menu, 2 Dig. 202. Sir W. Jones's Charge, June 10, 1785.

pel him by force, not being excessive, to do whatever work he orders him to perform; in which consists mainly the difference between a slave and a servant.(1)

(1) Nareda, 2 Dig. 222. Vrihaspati, Id. 223.

CHAP. VII.

ON INHERITANCE.

HAVING, in the preceding chapters, discussed, at a length sufficiently proportioned (it is hoped) to their importance, a variety of subjects, all, in the primary view of them, distinct from those of *Inheritance* and *Contract*, it becomes time now to enter upon the former of these two; in doing which, it is to be remembered that the Hindus are a patriarchal people, many families often living together as one; connected in blood, and united in interests; with various relative dependants, to be provided for out of the aggregate fund; but subject always to separation, by common consent, or at the instance of any one, or more, wishing to be disjoined, in his or their concerns; and subject also to the exclusion of any one or more, from participation in the inheritance, for causes to be hereafter enumerated.

Such union of interests, among families living together, and carrying on their transactions in common, constitutes *coparcenary*, to which survivorship attaches, differing in this particular respect from coparcenary with us, and resembling rather jointenancy; so that, on the death of a Hindu parcener, the succession to his rights, with exception of property separately acquired by him, vests in the other remaining members,—his sons, if he leave any, represent-

ing him as to his undivided rights, while the females of his family continue to depend on the aggregate fund, and under the general protection, till a *partition* takes place, which may never happen. But, according to the law, as it prevails in Bengal, where an undivided coparcener dies, leaving a childless widow; his share does not vest in the surviving parceners, but descends to his widow, as his heir;(1) whereas, the Mitacshara restricts her right of inheriting to the case of her husband so dying separated; allowing her, where he dies undivided, a maintenance only.(2) In every other case, universally, survivorship takes place, the remaining coparceners continuing to administer and enjoy the undivided property, the same as if no death had happened among them; and continuing to do so, while they remain thus incorporated. So that the doctrine of inheritance, to be perspicuously comprehended, must be investigated first, with reference to the death of one, not having been, at the time of it, a member of an undivided family, but sole proprietor, as the head of his own, of what he was in his lifetime possessed, in *severalty*; which will form the subject of the present, or VIIth chapter; to be followed, in the VIIIth, with the details of the law, where the deceased dies a *coparcener*. To these will be added, in the IXth and Xth, the *charges*, to which the inheritance is liable: and the causes that may *exclude* from it;—reserving, for the XIth, succession

(1) Jim. Vah. ch. XI. sect. i. 7. 14. 46. and notes.
Beng. Rep. ante 1805. p. 30. 48. 88. 91.

(2) Mit. on Inh. ch. II. sect. i. 20, note. Id. 31, note
Beng. Rep. ante 1805. p. 16. 29. 66.

to a widow, with other matters connected with the state of *widowhood.* These five chapters may be considered as exhibiting, in its fullest extent, though by way of outline only, the Hindu law of *Inheritance.* To these will be subjoined, for the reasons to be assigned, a chapter (the XIIth) on the *Testamentary power;* notwithstanding the averment, in a former part of this work, that a Will is a mode of disposing of property, unknown to the Hindu law.(1) After which, it will remain only to discuss in a concluding chapter, (the XIIIth,) the law of *Contracts;* the second of the two great subjects, reserved by the Royal Charters to be adjudged by their own law, in all cases of the kind, arising in the King's Courts, between native and native.

To begin with the subject of the present chapter. So intimate by the Hindu law is the connexion between the two subjects of *partition* in the life of the father, and *inheritance* upon his death, that they may be said almost to blend; since, not only upon his demise, but upon his renunciation of worldly concerns, with a view to the ending his days in devotion,(2) or, after such an absence from his family as may justify the inference that, if not in fact dead,(3) he has abdicated his temporal rights, the latter, in effect, by anticipation, as it were, attaches; as it does on his degradation for crime, unexpiated;(4)—the material difference between them, as

(1) Ante, p. 17.
(2) Ante, p. 114.
(3) Ante, p. 117.
(4) Ante, p. 113.

concerns the objects, being, that, on partition taking place, the father has a discretion with regard to property acquired by him, in contradistinction to what had descended, to divide it among his sons in such shares as they may respectively merit, or as circumstances may dictate, exercising it always, not arbitrarily, or capriciously; whereas, whatever be the nature of that of which he dies possessed, he has, according to the doctrine of the Mitacshara, no power to regulate the succession, which the law, upon his death, vests equally in all. In the series of a Hindu's heirs, the first, then, is his male issue, legitimately *born;* or, in its default, its substitute, and equivalent, a legally *adopted* son; what constitutes for this purpose one legally born, or legally adopted, having already been shewn, under the respective heads of Marriage (1) and Adoption. (2) By the ancient law, indeed, legitimacy, as well with reference to birth, as to filiation, had comparatively a very wide meaning. To what extent, in a stricter, or looser sense, it included sons *substituted,* may be seen in the Appendix to a former chapter; (3) and, with regard to *issue,* it comprehended that of marriages, (not now in use,) in the direct order of the tribes, as well as of women espoused in any of the disapproved forms of marriage; such mixed and irregular progeny, though inferior in pretensions to the *Aurasa,* or legitimate son of a woman of the same class with her husband, married in one of the approved forms,

(1) Ch. II. p 34.
(2) Ch. III. p. 61.
(3) Append. to ch. III. p. 163.

being so far legally born, as to be entitled to succeed, in preference to a subsidiary son, of whatever description. (1) But all such marriages having been long since forbidden,(2) (howsoever they may in some parts of India still occur,) and, as between issue of the body, and an adopted son, the law, as it respects inheritance, making no difference, except that the latter, being provided as a substitute, takes the entire estate only in default of the former, the subject will be treated with reference to the former only, namely, to issue legally begotten; the application holding good in general to both alike. The collective term *issue* comprehending not only as many sons as a man may chance to leave behind him, but sons' sons also, and the sons of the latter, or great grandsons,(3) it may be here remarked, that though, in former times, the eldest had his privilege, the whole have, by the Hindu law, ever constituted but one heir; like heirs in *gavelkind*, or the descent to females in default of heirs male, with us; —and that the doctrine of representation obtaining in it, if the son have died in the lifetime of his father, leaving a son, and that son also die, leaving one, and then the great grandfather die, the great grandson succeeds, as his grandfather would have done, had he survived; and, according to the *Vaijayanti*, (a commentary on Vishnu,) the right of representation, in all these cases, vests likewise in the widow: (4) but, according to other authorities, her

(1) Note to Mit. on Inh. ch. I. sect. xi. § 2, and Id. § 40
(2) 3 Dig. 485.
(3) Menu, ch. IX. 137. Datt. Mim. sect. i. 13.
Yajnyawalcya, 3 Dig. 63.
(4) Append. p. 24.

claim, in such case, is to maintenance only, to be supplied her by her father-in-law, and, on his death, by his heir.(1) —But here, for a reason that will be presently given,(2) the right of lineal representation stops, unless there have been an absence in a distant country, in which case it extends beyond the fourth, as far as the seventh degree; (3) so that, supposing the intermediate descendants to have failed, and a son of the great grandson to survive at the death of the proprietor, he would not inherit, as he would with us, but the widow of the deceased, the next in the series, would succeed in preference; though, in the event of the great grandson surviving his ancestor, and dying, the property so inherited by him would devolve upon his son, in consequence of its having vested in the father. Under the ancient law, the representative differed, in one instance, from him whom he represented; in that, if begotten by his uncle, according to a practice subsisting in early times, (4) he did not, though standing in the place of an eldest son, succeed to the privileges of one, but was entitled to an equal share only with his co-heirs.(5) But this, as most other anomalous modes of filiation, having, together with the rights of primogeniture, long since ceased, it is sufficient to have alluded to the circumstance: and, for the sake of clearness, and to avoid confusion, referring to the appropriate chapter for whatever regards the adopted son,(6) what follows will proceed upon the

(1) Append. p. 242.—S. 243.—C. 244.—S.
(2) Post, p. 150.
(3) Vrihaspati, 3 Dig. 411. 448. Ante, p. 116.
(4) Ante, p. 38.
(5) Menu, ch. IX. 120, 121.
(6) Ante, ch. III. p. 61.

supposition of the deceased having separated himself from, and become independant of brothers, if he had any; —in other words, of his having died divided, or otherwise sole owner of what property he possessed; it being proposed to exhibit the whole series of heirs, commencing with an only son, or a legal representative of him, which is the same thing; reserving, for the next chapter, as has been stated, the law of the subject, where, as most frequently happens, whether divided or undivided, he leaves more than one; rendering the subject, especially in the case of undivided property, more complicated. In the discussion of which, some comparison will incidentally occur, between the rules of inheritance according to the English law, and those that govern it among the Hindus; but as, among the latter, the distinction, as it prevails in ours, between real and personal property, does not for this purpose, in general, exist,(2) both species being, with them, descendible to the legal heirs, their law of *inheritance*, including what, with us, forms the law of *administration*, embraces, in this respect, a wider field; comprehending every possible claimant on the property of a person deceased, as well as every description of property, of which, during his life, he was seised or possessed. On the other hand, as they apply to property, there is, in point of simplicity, no comparison between the two codes; though it may be sometimes difficult, in that of the Hindus, to distinguish between what it exacts, and what it recommends, and expects only: as neither is it easy al-

(2) Note to Jim. Vah. ch. XI. sect. v. 36.
Ante, ch. I. p. 15

ways to extract, with correctness and certainty, amid the involved and discordant reasonings of commentators on the subject, what the law upon any given point actually is, adverting moreover to the conflicting doctrine of different schools. To perform what would be requisite in these respects, effectually, as it would require the master-hand of a Jones, or a Colebrooke; so will it be but very insufficiently supplied by the present imperfect essay, at something like arrangement and elucidation. Meanwhile, let the English inquirer be encouraged in his investigations by the assurance that, in pursuing them, he is relieved from much of the toil inherent in the study of the correspondent branch under his own law, as arising, with reference to real property, from the division of inheritances into different kinds, and the distinction of estates, as regarding the quantity of interest taken in them, with the doctrine of estates in expectancy; the whole of which together has, in the progress of centuries, given rise to a body of learning, in parts so nice and abstruse, and, upon the whole, so various and intricate, as to have occasioned often despair in the study of it; and which can never be comprehended to any practical purpose, without intense application, and frequent recurrence.—To return from this digression.

Before the subject of the present chapter can be properly understood, it is necessary to recollect the doctrine already alluded to, in treating on adoption, constituting, as has been observed, the *key* to the whole Indian law of inheritance, (1) and resting, as with us, upon services

(1) 3 Dig. 63, note. Ante, p. 116.

to be performed by the heir;—not however upon feodal ones to be rendered to a superior, but, like frankalmoigne with us, upon spiritual ones, to be conferred on the deceased, in extricating his spirit from its otherwise hopeless state, by a due discharge of his funeral rites.(1) Innumerable are the passages that have been collected from Scripture and heroic history, by writers on the law of the subject in question, in which benefits derived by the father, or other ancestor, through the son, grandson, or great-grandson, are stated as reasons for the preferable right of the lineal male heir, to a certain extent, before any other claimant.(2) This faculty it is, however foreign in reality to inheritance, the assumption of which (according to a learned writer) is to be resorted to, in order to give consistency to its rules;(3) and, how nicely the series of heirs is in general adjusted, with reference to the degree of benefit which each is, in this way, supposed capable of producing, is worthy of remark; the son's preferable right resting on his presenting the greatest number of beneficial offerings,(4) while the same degree is attributable, in default of their respective fathers, to the grandson or great-grandson, that is, as far as the fourth in descent, but not to any ulterior representative;—the fifth (says Menu(5)) not

(1) Jim. Vah. ch. XI. sect. vi. 29.
3 Dig. 65. 84. 491. 525. 623.

(2) Menu, ch. IX. 137.

(3) Mr. Colebrooke's Preface, p. 2, to his translation of the "Treatises on the Hindu law of Inheritance."—See also Jim. Vah. ch. XI. sect. vi 31. 33

(4) Jim. Vah. ch. IV. sect. iii. 36.

(5) Menu, ch. IX. 186, 187. Jim. Vah. ch. XI. sect. vi. 29. 31.
Devala, 3 Dig. 10.

having any concern with the funeral cake; which accounts for representation, for the purpose of inheritance, stopping with the great-grandson; while, upon this principle, ministering equally to the peace of their departed ancestor, if (according to an authority already cited) he leave a son, and the son of another son, and the sons' son of a third son, they take equal shares of his estate, *because* they confer the benefit equally. (1) This is the general, though not the sole and universal principle, inheritance not following alone benefits thus conferred, (2) but admitting also nearness of kin, or proximity by birth, as a conjoint consideration; (3)—the table of successions also, which, on failure of the great-grandson, devolves on the wife, reverting, after some deviations, to the lineal kindred, but stopping, at all events, with the seventh person, or in the sixth degree of ascent, or descent. (4)—In what the rites alluded to consist, and by what operation this pious office of the heir is conceived likely to be efficacious toward effecting the desired end, it does not belong to these pages to notice. (5) Sufficient be it here to state, that the right to inherit is connected with the power of benefitting; whence the title of the son begotten before that of any other possible

(1) Sir W. Jones's note to 3 Dig. p. 63, and note to Jim. Vah. chap. XI sect. i. 4. 34. 36. 40. Id. sect. vi. 29.

(2) Dig. 501.

(3) 3 Dig. 525. 533.

(4) Note to 3 Dig. 62. Menu, ch. V. 60.
Jim Vah. ch. XI. sect. i. 42.

(5) See Notes to 3 Dig. 460. 624.
Notes to sect. iv. § 72, and sect. vi. 35. of Dattaca Mimamsa.
Dubois, "On Customs of People of India;" ch. XXVII. XXVIII. and Asiat. Res. vol. vii. p. 263.

heir; with the anxiety of every reflecting Hindu for male issue, together with the law of adoption, as a substitute for it. Upon this ground, passages in books, purporting that the succession to the estate, and the right of performing obsequies, go together, have sometimes led to pretensions, founded upon the fact only of such celebration; which, however, are not to be construed, as if the mere act of solemnizing the funeral rites could give a title to the succession, but that the successor, being the nearest of kin the most competent, is bound to their due performance for the deceased, to whose property he has succeeded. (1)

The Hindu (as has been seen(2)) has inchoate, and operative rights in the property of his father; to which correspondent ones may be traced in the ancient law of England. The question in the Hindu books is, as to their extent; upon which different schools differ; inheritance, according to the Bengal school, being defeasible in the lifetime of the father, by gift, or other alienation, including (according to what has been established in the Bengal Courts) *will*, to take effect after his death; whereas, as he cannot by the Hindu law, administered upon Hindu principles, intercept the inheritance by *will*, so, by that law, according to the doctrine of the Benares school, followed, as it is, to the Southward, is his power of alienation in general comparatively limited and restricted, as it was formerly with us, till enlarged by successive statutes.(3) Uni-

(1) Dutnaram Sing v. Buckshee Sing; Beng. Rep. ante 1805. p. 22. Append. p. 245. 251.—C.

(2) Ante, ch. V. p. 106. and references.

(3) Ante, p. 17 to 21.

versally, it may be anticipated by partition, voluntary on the part of the father, or without his consent, if warranted by law; and it may be bound by adverse possession in a stranger for twenty years. (1) Civilly, or naturally, the ancestor must be dead, before the inheritance can vest,(2) upon the principle that *nemo est hæres viventis;* the same distinction of heir apparent, and heir presumptive, obtaining in both codes, English and Hindu. Thus the heritable pretension of the son of a Hindu being immediate, is *(apratibandha)*—"a heritage not liable to "obstruction," answering with us to the heir apparent, whose right, if he outlive his ancestor, is indefeasible; while that of remoter heirs, as of brothers, uncles, and others, is distinguished, as being *liable to obstruction, (sapratibandha,)* by the intervening birth of nearer ones, so that their title is not apparent, but presumptive only. (3) What constitutes a *civil* death has already appeared, (4) and will be farther noticed in its place, under *exclusion* from *inheritance.*(5) And, as to a *natural* one, known or presumed, it is observable here, that there are parts of India, where, if a man leave his native country to reside in another, his lands devolve upon the village in which they are situated, unless he return within a given number of years; (6) and the practice being common of going to Be-

(1) Yajnyawalcya, 1 Dig. 135. Vyasa and Vrihaspati, 3 Id. 443. Id. 442. and see p. 446. Ante, p. 32. and Append. p. 22.

(2) Nareda, 3 Dig. 474. 1 Id. 276.

(3) Mit. on Inh. ch. I. sect. i. § 8.

(4) Ante, ch. V. p 114.

(5) Post, ch. IX. p. 225.

(6) Append. to Report on the Territories conquered from the Peishwa, by the Hon. Mountstuart Elphinstone, p. 18.

nares to die, and being never more heard of, and long absence being considered by sages as equivalent to death,(1) the law has assigned various periods of absence, inferring the conclusion, according to the age of the person in question at the time of his departure, the lowest being twelve years;(2) at the expiration of which, without intelligence of him having been received, the heir is entitled to assume the succession; keeping certain fasts, then burning an image of his ancestor made of *Cusa*, and finally performing for him, in the prescribed form, his funeral rites.(3) To this place may be referred the enlargement of the rule, restricting the inheritance to the fourth in descent from the deceased; which must be construed as relating to residence in the same province: for, where the heirs have been residing in a distant country, the right continues to the seventh.(4)

Illegitimate children are a charge upon the inheritance, but do not inherit by the Hindu, any more than by the English law, excepting in the Sudra class.(5) Under the old law, indeed, there were instances where, in the higher classes, such issue were eventually inheritable; as in that of the son of concealed birth, *(Gudhaja,)* and in one description of the *Pauner-bhava*, or son of a twice-married woman. But these are now generally obsolete;(6) the latter only occurring still in

(1) 2 Dig. 472.
(2) 1 Dig. 266. 278.
(3) Jim. Vah. ch. VIII. 1 Dig. 227, 228. 3 Id. 450. Asiat Res. vol. vii. p. 243. Append. p. 246.
(4) Vrihaspati, 3 Dig. 441. 449. Ante, p. 146.
(5) Menu, IX. 178, 179. 3 Dig. 143. 283, and ante, p. 101.
(6) Append. to ch. III. p. 168.

some instances in the fourth order;(1) in which illegitimate continue to participate with legitimate sons, if there be any; and, if their be none, nor daughters, nor daughter's sons, they are then not distinguishable in point of inheritance from legitimate ones;(2)—so regardless has the law been of the manners and habits of this numerous, however inferior class.

If the heir be a minor, a guardian should be appointed for him, to whom the care of his property should be committed, till he is of age to take possession of it himself. This, in the case of the Brahmin, may be upon his ending his studentship, and returning from the house of his preceptor.(3) But, in general, minority continues till the completion of the sixteenth year.(4)

Such being the right of the son, the Hindu law of inheritance corresponds so far with our own, that property under it lineally descends, and that the male issue take before the female; with this difference, that, among the Hindus, the males in general take altogether, as do with us the females,—the claim of primogeniture, with them, having been at no time more than partially allowed, and now no longer existing; and with this peculiarity also, in which it differs from all other codes, that, in default of male issue, the *widow* succeeds, her

(1) Mohun Sing v. Chumun Rai; Beng. Rep. ante 1805. p. 30.

(2) Mit. on Inh. ch. I. sect. xii. 3 Dig. 143.
Datt. Mim. sect. ii. 26. Datt. Chandr. v. 29, et seq.
Ante, ch. III. p. 102.

(3) Menu, ch. VIII. 27.
The Retnacara, 3 Dig. 543. 1 Id. 293, and ante, ch. IV. p. 101.

(4) Ante, p. 101.

place being assigned her, in every enumeration of heirs, next after sons, and before daughters; (1) in consideration (as is said) of the assistance rendered by her to her husband, in the performance of his religious duties. (2)

Whatever may have been said as to the depressed state of the sex in the East, and upon its general incompetence to inherit, (3) it must be admitted that a "faithful wife," whether during the life of her husband, or on his decease, is, by the Hindu law, an undoubted object of its care, if not of its unqualified liberality. In what degree she is so, has already in part appeared in the chapter on *Marriage*, (4) and will be farther considered under *Charges on the Inheritance*, (5) and in treating upon *Widowhood*. (6) She is conspicuously so in her right to inherit; a right vested in her by marriage, to be perfected on the death of her husband, dying without leaving male issue. This obtains universally, the deceased, at his death, having been separated from co-heirs. (7) But, if he die a

(1) Yajnyawalcya, 3 Dig. 457. Devala, Id. 474, explained, p. 482.
Vishnu, Id. 489. Misra, Id. 535.
Jagannatha, Id. 481. Jim. Vah. ch. XI. sect. i.
Mit. on Inh. ch. II. sect. i. 39. Menu, ch. IX. 185.
Beng. Rep. ante 1805. p. 64.

(2) 3 Dig. 456.

(3) Jim. Vah. ch. XI. sect. vi. 8. 11. and notes.
3 Dig. Text ccccxiii Id. p. 528, 529.

(4) Ante, ch. II. p. 34.

(5) Post, ch. X.

(6) Post, ch. XI.

(7) Jim. Vah. ch. XI. sect. i. 2. 6. Mit. on Inh. ch. II. sect. i. 39.
Vrihaspati, 3 Dig. 458. *Vriddha* Menu, 3 Dig. 478. 483.

member of an undivided family, the consequence, with respect to the widow, varies, according as the doctrine of the Bengal or Benares school prevails, as has been already stated. (1)

Her right, however, in any case, to take at all, as heir, has been contested upon passages and texts ill understood, and upon arguments carrying with them almost their own refutation. (2) Among other objections to it, their dependant state has not been overlooked; (3) and their incompetency has been insisted upon, as an inference from the religious use to which wealth is destined; (4) as if this were its only use; (5) not to mention the direct answer this argument receives, from the wife's performance of religious ceremonies, in conjunction with her husband in his lifetime, whence her appellation of *patni*, (6) as well as her celebration of acts after his death spiritually beneficial to him, only in a degree less than those performed by a son. (7) Passages postponing, if they do not omit her altogether in the order of heirs, must be construed as applying to the case, where the deceased was an unseparated brother, whose estate, failing male issue, vests in the surviving parceners;—a point, upon which, as already inti-

(1) Ante, p. 142.
(2) Jim. Vah. ch. XI. sect. i. § 1.
(3) Mit. on Inh. ch. II. sect. i. § 26.
(4) Mit. on Inh. ch. II. sect. i. § 14.
Text ccccxiii. 3 Dig. 484. 317.
Jim. Vah. ch. XI. sect. vi. § 13.
(5) Mit. on Inh. ch. II. sect. i. § 22.
(6) Note to Jim. Vah. ch. XI. sect. i. § 47.
Note to Mit. on Inh. ch. II. sect. i. § 5. 29.
(7) Menu, IX. 28. Jim. Vah. ch. XI. sect. i. § 43.

mated, the schools differ. (1)—It has been moreover contended, that, at all events, her succession must depend upon amount; so that, if the property be but small, it may be allowed; but, if considerable, she is to be satisfied with maintenance; (2)—a criterion, obviously of too arbitrary and uncertain a nature, to have the effect of regulating a right. But, among all these spurious and repudiated doctrines, none has been more insisted upon, than that her right to inherit is inseparably connected with her appointment, by means of another, to raise up issue to her husband; (3) in which case the son so produced, and not the widow, would be heir; a practice also which, while it prevailed, was reprobated; and which, for a time that may be said to be beyond memory, has been no longer in use.

Setting aside the above objections, as not entitled to regard, the right of the widow, to succeed as heir to her husband, is subject to the single condition, of her having been faithful to him during coverture. An unchaste wife is excluded from the inheritance. But, nothing short of actual infidelity in this respect disqualifies;—nor, the inheritance once vested in her, is it liable to be divested, unless for loss of caste, unexpiated by penance, and unredeemed by atonement. (4) Prior to the *(Cali)* present age, while the practice prevailed of contracting marriages in various tribes, rank and privilege among wives was regulated by class, she among

(1) Ante, p. 142. 155.
(2) Mit. on Inh. ch. II. sect. i. § 31. 33. 35.
(3) Mit. on Inh. ch. II. sect. i. § 8. 10, 11. 15. 18. 3 Append. p. 248.—S.
(4) Mit. on Inh. ch. II. sect. i. 30. 37. 3 Dig. 479. Append. 344.—C.

them, who was of the same class with her husband, having precedence, without regard to any other consideration. (1) But, such license not now obtaining, where a man has left more widows than one, and no son by any, she who was first married, being the one who is considered to have been married from a sense of duty, succeeds, maintaining the others; (2) as, indeed, the widow, in all cases, taking as heir, takes, subject to the charge of providing, out of the inheritance, for such members of the family as were dependent on the deceased in his life;—the others succeeding in their turn; (3) it being a principle, that whoever takes the estate of the deceased, must maintain those whom he was bound to support. (4) It may be here noticed, that the widow has not the same dominion over property inherited by her from her husband, that she has over her *Stridhana*, emphatically called "woman's property;" as has already been seen in a former chapter; (5) as also, that the descent of the one and of the other, is different; as will appear in the chapter treating upon *widowhood*, (6) not to interrupt the series of heirs, and course of inheritance, forming the proper subject of the present.—To proceed therefore on the supposition of the deceased having left neither issue male, nor widow, but daughters.

The right of *daughters* to succeed, in default of sons

(1) Jim. Vah. ch. XI. sect. i. 47. 3 Dig. 484.
(2) 3 Dig. 486. Ante, ch. II. p. 55.
(3) 3 Dig. 461. 489.
(4) 1 Dig. 321.
(5) Ante, ch. I. p. 25.
(6) Post, ch. XI. p. 236. Daya Crama Sangraha, ch. I. sect. ii. 4.

and widow, is not to be confounded with that of the *appointed* daughter, under the old law. That appointment was one of the many substitutions for a son; and, by a fiction no longer subsisting, regarded as one. The daughter under consideration takes as a principal in her own right, in default of the widow, who has precedence. The appointed daughter derived her title from the will and act of the father. The daughter not appointed, but succeeding, derives hers from the law, having regard to the general principle of conferring, at his obsequies, benefits on the deceased. (1)

Daughters, like sons, conferring proportionate benefits on the deceased, take in common, but with this difference, that they succeed, not indiscriminately, but in order, as they are single, married, or widows; the single, though there should be but one of that description, taking the whole of the inheritance first, to the exclusion of the rest of her sisters during her life. The single having enjoyed it, it vests next in the married ones, and finally in such as are widows, with a proviso that they be mothers of sons, or, in the instance of the married, likely to become so: (2) on the ground that daughters inherit, in right of the funeral relation to be presented by their sons; while the son succeeds in his turn, as

(1) Menu, ch. IX. 130. Jim. Vah. ch. XI. sect. ii. 1.
3 Dig. 592.—597. Mit. on Inh. ch. II. sect. ii.
Vrihaspati, 3 Dig. 186. Vajnyawalcya, 437.
Vishnu, 489. Nareda, 491.

(2) Jim. Vah. ch. XI. sect. ii. § 1. 4. 12. Mit. on Inh. ch. II. 2, 3.
Gudhadur Serma v. Ajodhearam Chowdry, Beng. Rep. ante 1805. p. 6.
3 Dig. 491. Append. p. 248.—8.

being the person to offer it. (1) This is analogous to the law, as applicable to the *appointed* daughter, before that substitution, with others of a more questionable kind, became obsolete; (2) and it has the effect of excluding childless widows. It is observable, however, that the Mitacshara, so far from sanctioning any such proviso, has, in express terms, controverted the notion, that women inherit only through male issue. (3) And it is said that, in Southern India, widows, if un-endowed, inherit before married daughters endowed, and that the Smriti Chandrica, commenting on the term un-endowed, specifically enumerates widows. According to one opinion, not only the sons of daughters, but the daughters of daughters also inherit, in default of sons; (4) but this does not appear to have been sustained: on the other hand, where there are sons, their right of succession is postponed to that of other daughters of the deceased; (5) and, where such sons are numerous, when they do take, they take *per stirpes*, and not *per capita*. (6) Authorities, postponing still farther their right, have been denied; (7) but the succession in the descending line from the daughter proceeds no farther, the funeral cake stopping with

(1) Jim. Vah. ch. XI. sect. xi. § 2. 17.
3 Dig. 498, et seq.—Id. 481.
(2) Menu, ch. IX. 132, 133.
(3) Mit. on Inh. ch. II. sect. ii. § 3. 3 Dig. 493. 591. Append. p. 248.
(4) Balambhatta, note to Mit. on Inh. ch. II. sect. ii. § 6.
(5) Jim. Vah. ch. XI. sect. ii. § 23—25.
Daya Crama Sangraha, ch. I. sect. iv.
(6) 3 Dig. 501.
(7) Baloca, Jim. Vah. ch. XI. sect. ii. § 27. Misra, 3 Dig. 535.

the son; (1) which is an answer to the claim of the son's son, grounded on the property having belonged to his father. (2) Neither, according to Jimuta Vahana, on failure of issue, does the inheritance, so descending on the daughter, go, like her *Stridhana*, to her husband surviving her, but to those who would have succeeded, had it never vested in such daughter: (3) but by the Southern authorities, it classes as *Stridhana*, and descends accordingly. And, upon the same principle, the husband is precluded during her life from appropriating it, unless for the performance of some indispensable duty, or under circumstances of extreme distress. (4) Whereas, the daughter's own power over it is greater than that of the widow of the deceased, whose condition is essentially one of considerable restraint. (5) In default therefore of issue, quitting the descending line, the *melancholy succession*, as it has been called, takes place; and the inheritance *ascends*.

The feudal abhorrence of succession from sons to parents, (*hæreditas nunquam as cendit*,) upon whatsoever reason founded, revolts common minds, particularly as it excludes the father, to whom by nature we are so bound; for whose services and bounties the offspring is in general so indebted. Peculiar, in its full extent, to our own laws, and such as have been deduced from the same original, it may be remarked that, with regard to the mother,

(1) Jim. Vah. ch. XI. sect. ii. § 2.
(2) Compare 3 Dig. 502, with the Comment on Nareda, Id. 491.
(3) Jim. Vah. ch. XI. sect. ii. § 30. 3 Dig. 494. 497.
Daya Crama Sangraha, ch. I. sect. iii.
(4) Mit. on Inh. ch. II. sect. xi. § 31, et sec. Ante, p. 26.
(5) Post, ch. XI. p. 244. 3 Dig. 465, et seq.

it existed in the codes of Jerusalem, of Athens, and of early Rome, the sex having been everywhere, and at all times, comparitively restricted in the amount and enjoyment of property; but where, in England, feudal subtlety has not been allowed to prevail, namely, in the distribution on the death of the owner of *personal* effects, the claim of either has had a considerate attention paid to it; and justice and nature, in this part of our juridical arrangements, have been vindicated. In one particular, the Hindu law, according to the sentiments of some by whom it has been handed down, is at variance with that of every other people to whom we are accustomed to look, as to a standard for legislative wisdom; in that, failing wife and issue, they represent the mother as succeeding first, and the father not till after her;(1) her prior title resting with some,(2) on the pains and merit of child-bearing; with others,(3) on the fanciful notion of her comparative propinquity to her issue, so as best to satisfy the rule of Menu, that "to the nearest *Sapinda*, "the inheritance belongs;"(4) though, upon another principle, equally familiar among Hindu jurists, namely, that "the seed is preferable to the soil,"(5) the right in this respect would be rather with the father.(6) Accordingly, respecting the pretensions of the mother, much difference of opinion prevails, as appears from a learned

(1) Mit. on Inh. ch. II. sect. iii. 2.
(2) 3 Dig. 504, 505.
(3) Mit. on Inh. ch. II. sect. iii. 3.
(4) Note to Mit. on Inh. ch. II. sect. iii. 3.
(5) Menu, ch. IX. 35. 3 Dig. 215, et seq.
(6) Jim. Vah. ch. XI. sect. iii. 3 Id. sect. iv. 3.

note by the translator of the Mitacshara;(1) assigning, in conformity with some authorities, priority to the father; with others, joint, co-ordinate participation; and, alleging with a third set, the vague criterion, already alluded to,(2) of relative respectability, in point of personal qualifications, the one to the other. Another idea has been that, on failure of the mother, not the father, but the paternal grandmother succeeds, excluding the father altogether, as the surer means of preserving the property in the same tribe; upon the ground that, the father succeeding, the estate becomes a paternal one, and, as such, may devolve as well on sons belonging to a mixed class, as on issue by a wife of his own;—whereas, if taken by the grandmother, it descends, as a maternal one, to persons of the same class only,—namely, to her daughters and their representatives.(3) Of this solicitude to preserve the inheritance in the tribe to which it had belonged, an early instance is exhibited, in the decree made in the case of the daughter of *Zelophahad*, of the tribe of *Manasseh*; upon whose death, without sons, it was settled, that they should succeed to their father's land, but, for the reason given, that they, and others on whom the inheritance should devolve under the like circumstances, should marry in their own tribe.(4) And the English lawyer may be reminded by it of the pains taken, so far as regards real property, to justify, upon feudal principles, a similar exclusion of the father from inheriting to his son,

(1) Note to Mit. on Inh. ch. II. sect. iii. 5.
(2) Ante, p. 87.
(3) Mit. on Inh. ch. II. sect. iv. 2, and note to Id. sect. iii. 3.
(4) Numbers, XXVII. 1. XXXVI. 6.

under our own code.(1) But, whatever may have been formerly the force of this argument, as it respects Hindu fathers, there must have been an end of it, from the time that marriages among them, with women of inferior classes, ceased to be legal.(2) Although, between the different opinions, Jagannatha, commenting on the subject, professes neutrality, declaring that there is no certainty on the point,(3) it is evident that the inclination of his judgment was in favour of the father, upon the ground that influences throughout the Hindu law of inheritance, namely, his comparative efficacy in performing obsequies to the deceased; upon which ground, the son of the daughter is preferred in succession, as well to both parents, as to the brother.(4) Of a son dying childless, and leaving no widow, Menu, according to the gloss of Calluca Bhatta, says, "the father and mother shall take the "estate."(5) This, according to Hindu reasoning, establishes in the father the right of prior enjoyment; other versions of the same text, omitting the father, have been construed to suppose the father dead;(6) and, if the opposite views that have been taken of the question are resolvable into nothing more than different readings of the text of Vishnu, each resting upon respected authority, reason ought to decide between them with Jagan-

(1) 2 Blackst. Comm. p. 210.
(2) Ante, ch. I. p. 18, and 3 Dig. 485.
(3) Dig. 503.
(4) Jim. Vah. ch. XI. sect. iii. § 3.
(5) Menu, ch. IX. 217.
(6) Mit. on Inh. ch. II. sect. iii. § 2.
Jim. Vah. ch. XI. sect. iii. § 2.
3 Dig. 503. See also Menu, ch. IX. 185.

natha, in favour of the father; upon the principle, that, "if two texts differ, reason, or that which it best sup- "ports, must in practice prevail, when the reason of the "law can be shewn."(1) That the father takes first, is the doctrine of the Bengal school; resting the subsequent title of the mother on her claims as having borne the deceased, and nursed him in his infancy. Step-mothers, where they exist, are excluded;(2) and, in whatever order the natural mother inherits, she is, like the widow, taking as such,(3) restricted from aliening the estate, unless for her necessary subsistence, or for pious purposes beneficial to the deceased; and her power over it, even for these, is allowed but to a moderate extent.(4)

Had the property been the mother's, in the Hindu sense of "woman's property," it would descend on her death to her daughters; but, having been inherited by her from her son, it passes, according to the law as practised in Bengal, not to her heirs, but to his;(5) which, on failure of issue of the proprietor, male and female, of his widow, and parents, is his *brother* or *brothers;* those of the whole being preferred to those of the half-blood;

(1) 3 Dig. 489. Jim. Vah. ch. XI. sect. i. § 5, and note.
Id. ch. XI. sect. iii. § 1. 3. Dig. 527, et seq.
Yajnyawalcya, 3 Dig. 505.

(2) Menu, ch. IX. 185. Jim. Vah. ch. XI. sect. vi. 3, 4.
Mit. on Inh. ch. II. sect. iii. 3, 5.
Bishenpirea M. v. R. Soogunda; Beng. Rep. ante 1805. p. 40.
Baraineo Dibah v. Hirkishor Rai; Id. p. 42.
Rychundoo Narain Chowdry v. Goculchund G.; Beng. Rep. 1805. p. 46.
Daya Crama Sangraha, ch. VI. 23. VII. 3.

(3) Post, p. 244.

(4) Mt. Bijya Dibeh v. Mt. Unpoorha D.; Beng. Rep. 1806. p. 84.

(5) Note to Jim. Vah. ch. XI. sect. iv. 7.

those of the half succeeding only on failure, or in default of those of the whole.(1) According to the Mitacshara, which is followed, in this respect, by other authorities of Southern India, so vested, it classes as *Stridhana*,(2) and descends accordingly, under the rules of inheritance for property of that description, to her daughters, and not to her sons: but, according to the doctrine of the Smriti Chandrica, the right of inheritance is vested in different persons, as it was acquired before or after coverture. With regard to the brother in general, his title rests on the benefits he confers, by the offer of oblations, in which the deceased owner of the property participates, and in presenting others which the deceased was bound to offer; and, in this respect, occupying his place.(3) And as, between the whole and the half brother, the former takes first, as presenting oblations to six ancestors, which the deceased was bound to offer, and three in which he participates: while the latter presents none to ancestors; but presenting three in which the deceased participates, he is superior to the nephew; who, accordingly, though son of a brother of the whole blood, is postponed in succession to his uncle of the half,(4)—a preference nevertheless that has been censured.(5) A distinction is glanced at, as varying the

(1) Jim. Vah. ch. XI. sect. v. § 1. 8, 9. 11.
Mit. on Inh. ch. II. sect. iv. 3 Dig. 506.
Gudhadur Serma and another *v.* Ajodhearam Chowdry; Beng. Rep. ante 1805. p. 6. Daya Crama Sangraha, ch. I sect. vii.

(2) Ante, p. 30.

(3) Jim. Vah. ch. XI. sect. v. § 3. Mit. on Inh. ch. I. sect iv

(4) Jim. Vah. ch. XI. sect. v. § 12.

(5) Note to Mit. on Inh. ch. II. sect. iv. 6.

succession, according as the property in question happens to have been inherited, or acquired by the deceased, but it does not appear to be established.(1)

The line of brothers being exhausted, their sons (or the nephews of the deceased, as already intimated) succeed, the whole being still preferred to the half-blood,(2)— a son of an uterine brother conferring benefits on the mother of the deceased proprietor.(3) To which is to be added, that, unlike sons of daughters, they take *per capita*, not claiming *jure representationis*, as if their fathers had had a vested interest in their brother's property, before their decease; whereas the right only vested in them by the demise of the owner, their fathers being at the time dead.(4) The sons of nephews, or the grandsons of brothers next take; but here the succession in the male line from the father direct stops, the great grandson being too distant in degree to present oblations;(5) and, failing heirs of the father down to the great grandson, the inheritance devolves on his daughter's son, in preference to the uncle of the deceased; as, failing male issue of the latter, it descends to *his* daughter's son, in preference to his brother.(6) But the sister herself, being, on account of her sex, no giver of oblations at periodical obsequies, is

(1) 3 Dig. 506.
(2) Jim. Vah. ch. XI. sect. vi. § 1, 2.
Mit. on Inh. ch. II. sect. iv. § 7, 8. 3 Dig. 518, 527.
Daya Crama Sangraha, ch. I. sect. 8.
(3) 3 Dig. 519. 524. Daya Crama Sangraha, ch. I. sect. 8. 1.
(4) Balambhatta, note to Mit. on Inh. ch. II. sect. iv. 7.
(5) Jim. Vah. ch. XI. sect. vi. § 7. Menu, ch. IX. 186.
3 Dig. 526, 527.
(6) Jim. Vah. ch. XI. sect. vi. § 8. 3 Dig. 527.

excluded; as would be the case with the daughter, but that her right of succession is provided for by an express text;(1)—the general principle being, that the sex is incompetent to inherit.(2) Such appears to be the law of the Bengal provinces; but it is not to be taken as universal, opinions existing, that the term "brethren," in the enumeration of heirs, in the Mitacshara, includes *sisters;* as "parents," have been seen to do *father* and *mother;* but they stand controverted:(3) Jagannatha also observing that "it is nowhere seen, that sisters inherit the property "of their brothers;" and, referring to a text that gives colour to their pretensions, he adds, that it is sufficiently explained, "as relating to the allotment of an adequate "sum to defray their nuptials."(4) The same observation applies to the claim of nieces.(5) A sister's son inherits in Bengal; but not in the provinces that follow the Mitacshara.(6)

To this extent the law of inheritance is established with little variation, comprehending, as has been seen, the deceased's family, and near relations, viz.: his issue male and female; his wife, who takes immediately in default of sons; his parents, brothers, nephews, and grand-nephews; the *competency* to benefit him, in the solemnization of obsequies, at once forming the consideration for, and the *degree* of it determining the order

(1) Note to Jim. Vah. ch. XI. sect. vi. 8.
(2) Ante, p. 156. Append. p. 248. S.—252. C. and S.254.
(3) Note to Mit. on Inh. ch. II. sect. iv. §. 1.
(4) 3 Dig. 517. 28. Menu, ch. IX. 212.
Mt. Runnoo v. Jco Rannee; Beng. Rep. p. 8.
(5) Append. p. 249.—S.
(6) Rajchunder, N. C. v. Goculchund; Beng. Rep. ante 1805. p. 46.

of succession; (1)—benefits conferred by the nearest of kin being regarded of more importance than those offered by one more distantly allied: (2)—just as ability for personal service constituted the claim of heirship among the feudal nations, including our own. And as, among them, together with the nations of antiquity, the *agnatic* succession was in general preferred, so is it among the Hindus; the instances, in which females are allowed to inherit, being deemed exceptions. (3)

Failing issue of the father, inheritance continues to ascend upwards to the grandfather, and great-grandfather, the grandmother and great-grandmother, the latter being preferred in time, by those who contend for the precedence, in succession of the mother before the father; descending also downwards to their respective issue, including daughters' sons, but not daughters; and with the same distinction that has been already noticed, as between the whole and the half-blood. But, in proportion as the claim becomes remote, it varies in particulars with different schools, and authors; for the details of which, being beyond the scope of a work so general as the present, recourse must be had to the two translated treatises on the subject, including the summary of *Sricrishna Tercalancara*, with the notes and remarks of its learned translator; as also to the tahular sketch that will be found

(1) Jim. Vah. ch. XI. sect. vi. §. 29. 31.
(2) 3 Dig. 520. 455.
(3) Note to Jim. Vah. ch. XI. sect. vi. 8.
Gungadutt Jha v. Sree Narain Rai; Beng. Rep. 1812. p. 325.
(4) Pref. to Dig. p. xxi. Pref. to Treatises, p. vi.

in the Appendix;(1) as well as to the "Digest," expressly on the law of "Successions. (2)

In default of natural kin, the series of heirs, in all the classes, that of the *Brahmin* excepted, terminates with the preceptor of the deceased, his pupil, his priest hired to perform sacrifices, or his fellow-student, each in his order; (3)—and, finally, failing all these, the lawful heirs of the Cshatrya, Vaisya, and Sudra, are learned and virtuous Brahmins; (4)—a description, however special, yet too comprehensive to be consistent with the right of escheat, for want of heirs, in the king; and, therefore, it has been narrowed, in construction, to such as reside in the same town or village. (5) In the event of the estate of any of these vesting by inheritance in a Brahmin, as he, being such, cannot perform obsequies for one of an inferior tribe, the duty may be discharged by the substitution of any qualified person, equal in class with the deceased: and, in all cases, where the heir is under a disability, he must take the same course, paying the person employed for his service. (6)

Failing all preceding claimants, the property of any of the inferior classes vests, by escheat, in the king:

(1) Append. p. 262.

(2) Jim. Vah. ch. XI. sect. vi. to the end.
Recapitulation by Sricrishna Tarcalancara. Id. p. 224.
Mit. on Inh. ch. II. sect. v. and vi.
3 Dig. 525—532. Menu, ch. IX. 187.

(3) Jim. Vah. ch. XI. sect. vi. 24.
Mit. on Inh. ch. II. sect. vii. 3 Dig. 533. 444. 504.

(4) Jim. Vah. ch. XI. sect. vi. § 27. Mit. on Inh. ch. II. sect. vii. § 4.
3 Dig. 537. Post, p 308.
Daya Crama Sangraha, ch, I. sect. x. 27, et seq.

(5) Jim. Vah. ch. XI. sect. vi. § 27. 3 Dig. 537.

(6) 3 Dig. 545, 546.

who, as with us, may be said to be, in this respect, *ultimus hæres;*(1) and, as an incident, he is to cause obsequies to be performed for the deceased.(2) But the estate of a Brahmin descends eventually, and ultimately, to Brahmins, or learned priests.(3) That it cannot be taken as an escheat by the king, "This (says "Menu) is a fixed law."(4) For the king to take it under any circumstances, or for any purpose, other than that of protection, and preservation for the rightful owner, would be sacrilege, equivalent to that of appropriating what has been consecrated to the gods.(5) Rather than it should so escheat, should there be none of the same class competent to take it, (meaning probably, as before, in the same town,) it is "to be cast "into the waters;"(6)—a figurative declaration, doubtless, never intended to be literally, and universally enforced.

As holy mendicants, and avowed devotees, such as hermits,(7) ascetics,(8) and professed students of theology,(9) in abdicating all worldly ties, lose their title,

(1) Jim. Vah. ch XI. sect. vi § 34.
Mit. on Inh ch. II. sect. vii. § 6.
Vrihaspati, 3 Dig. 538. Nareda.
(2) The Vishnu Purana, 4. 3 Dig. 623.
(3) Sancha and Lichita, 3 Dig 539. 1 Id. 469.
Mit. on Inh ch. IV sect vii. 5.
Append. p. 256.—E. and vide post, p 308.
(4) Menu, ch. IX. 189.
(5) 3 Dig. 587.
(6) Nareda, 1 Dig. 335, 336. 3 Id. 541.
(7) Vanaprasta.
(8) Yati, or Sanyasi.
(9) Brahmachari.

as heirs, to those to whom they are by nature related,(1) so is any property that they have, such as the hoard of wild rice belonging to a hermit, the gourd, clout, and other similar effects of an ascetic, and the books, clothes, and the like, of a student,(2) transmissible, not according to the general law of inheritance, but among themselves, as with us in the case of corporations.(3) Of such successions an instance will be found in the Appendix,(4) and several in the Bengal reports, referable to the religious order of *Sanyasis*, or *Gosains;* who, being restricted from marrying, and consequently precluded from leaving legitimate issue, are, on their death, succeeded in their rights and possessions by their *Chelas*, or adopted pupils.(5) It may be added here, that lands endowed for religious purposes are not inheritable at all as private property, though the management of them, for their appropriate object, passes by inheritance, subject to usage; as in the case of many of the religious establishments in Bengal, where the superintendance is, by custom, on the death of the incumbent, elective by the neighbouring *mohunts*, or principals of other similar ones.(6)

(1) Post, p. 225.

(2) Note to Jim. Vah. ch. XI. sect. vi. § 36.

(3) Jim. Vah. ch. XI. sect. vi. 35. Mit. on Inh. ch. II. sect. viii. 3 Dig. 546. Daya Crama Sangraha, ch. I. sect. x. 35, et seq.

(4) Append. p. 257.

(5) Beng. Rep. 1806. p. 73. 92. Id. 1807. p. 144. Id. 1810. p. 246.

(6) Elder Widow of Rajah Chutter Sein *v.* younger Widow of ditto, Beng. Rep. 1807. p. 103.
Narain Das *v.* Bindhabun Das, Id. 1814. p. 481.
Append. p. 259.—Sir W. Jones.

Thus does property in general vest, on the death of the owner, who has held it in severalty, and is represented by a single heir; but the tenure is more usually joint and undivided, such being the primeval, and natural condition of Hindu families; the consideration of which, involving partition among coparceners, will form the subject of the following chapter.

CHAP. VIII.

ON INHERITANCE OF PROPERTY HELD IN COPARCENARY.

THE foregoing chapter has proceeded on the supposition of the property of the deceased having passed to a single heir, lineal or collateral, in the descending or ascending line; or to those entitled to succeed, failing all natural connexion, so as to vest at last in the *raja*, or king, as the ultimate and universal representative;—such appearing to be the simplest form, in which the subject could, in the first instance, be presented. But, it oftener happens, that he is succeeded on his death by a plurality of persons, entitled as *Coparceners*, making together but one heir; like the descent with us, by the common law, to females, or by particular custom, as *gavelkind*, to all the males in equal degree. To this descendibility of estates, by the Hindu law, to all the sons in common, there appears to have been ever, in point of fact, an exception in the case of the crown; as it is with us, at this day, in the same case, where there are only females to inherit. The exception, arising from the nature of the thing, is noticed by Menu, who speaks of a dying king "having duly com-"mitted his kingdom to his son;"(1) a course, which Jagan-

(1) Menu, ch. IX. 325.

natha refers to usage rather than to law.(1) Upon the same principle of usage, stands, with respect to many of the great Zemindaries of Bengal, and other parts of India, at this day, the exclusive succession of the eldest son,(2) or of a *Jobrai*, (Yava-Raja, *juvenis rex*,)—a young prince, associated to the empire, as coadjutor to the king, and his designated representative.(3) With these exceptions, the rule of coparcenary prevails; in investigating which, it is necessary to observe, that the deceased may have left, not only more sons than one, but brothers, as well as a widow or widows, and daughters, together with other dependants; and such sons and brothers may have their wives and children respectively, the whole having constituted, in the lifetime of the deceased, (not so many coparceners indeed, in the proper sense of the term, but) an *undivided family*. Or, supposing him to have been a single man, with collateral relations only, their descendants and connexions, all living together in coparcenary, his death makes no difference in this respect among the survivors. If undivided while he lived, till a division takes place among them, they still continue so, in point of law, howsoever appearances may indicate a different state; which leads to the consideration of, I. The state of the family, remaining undivided. II. The right of partition. III. The property to be divided. IV. How

(1) 2 Dig. 121, 122. See also, Id. p. 118. 188. and 3 Id. 97.

(2) Beemlah Dibeh v. Goculneth; Beng. Rep. ante 1805. p. 32.
Koonwur Bodh Sing v. Seonath Singh; Id. 1813. p. 415.
Post, p 211. Append. 262.—E.

(3) Ramgunga Deo v. Doorgamunee Jobrai; Beng. Rep. 1809. p. 200.
Urjun Manie Thakoor v. Ramgunga Deo; Id. 1814. p. 469.
Append. to ch. p.

partition takes place. V. The proof of it, if disputed. VI. Matters subsequent.

I. The inheritance having descended in coparcenary, the characteristic of this state, while it continues, is, with reference to the property and management of it, a community of interest;(1) though, in order to avoid confusion, reason and law alike suggest the propriety of adopting some one to conduct the family concerns. The eldest has a claim to this confidence, but it is subject to character, and the general sense of the coparceners, without a concurrence of which no express or implied pretension of the kind can have any validity.(2) This management regards the dealings and transactions that are carried on under it, professedly on behalf of the family;(3) the obligatory force of which becomes of importance alike to the members in general, and to creditors. In this capacity, all his acts and disbursements, to be of validity, must be for the general good, if not for the immediate and indispensable maintenance of the whole;—for objects, chargeable upon the common stock, including works of piety, which it concerns all should not go unperformed;(4) with this difference, that where his acts have been for the support of the family, the charge is in its nature binding upon the joint property, though the remedy may be against

(1) Prima societas in ipso conjugio est, proxima in liberis, deinde, *una domus; communia omnia* 1 Cic Offic. lib. i 17. Oxford edit. 4to.

(2) Jim. Vah. ch. I. 36, 37. 2 Dig. 533. Ante, p. 112. Append. p. 265.—C. and E. 267. 269.

(3) Jim. Vah. ch. III. sect. 1. 15. Vyasa, 2 Dig. 189. Prannath Das v. Callahunker G.; Bengal Rep. ante 1805. p. 49.

(4) Mit. on Inh. ch. I. sect. i. 28, 29.

him only by whom it was incurred, or who, at the time may have been the acting manager; whereas, if in the course of trade, or for charitable purposes, in order to its being so, it must have had the consent of the rest, express or implied. (1) Accordingly, it imports creditors to take notice, whether the family, with which they are about to deal or contract, be divided, or undivided; and, if the latter, at their peril, to see that the transaction be one, by which the rest of the co-heirs will be concluded; since, otherwise, he only, with whom it has been entered into, will be answerable for it, and not the common stock. Such seems to be the result of the decisions referred to below: (2) of which those at Bengal rest upon the highest living authority in Hindu law,—that of Mr. Colebrooke; who, upon this point, and with reference to a case at Madras, upon which he was consulted, held, "that the consent of the sharers, express or implied, is "indispensable to a valid alienation of joint property, "beyond the share of the actual alienor"—observing, in the course of his opinion, "that the only doubt which "the subtlety of Hindu reasoning might raise, would "be, whether it be maintainable even for his own, the "property being undivided." (3) Such may be the construction of a passage in the Mitacshara, on the ground of co-ordinate property. (4) But, where each parcener is considered to have, vested in him, during the copartner-

(1) Append. p. C.

(2) Prannath Das v Calishunker Ghoosal; Beng. Rep, ante 1805. p. 51. Sheva Dass v. Bishonath Dobee; Id. p. 46.

(3) Notes of Cases at Madras, vol. ii. p. 329.

(4) Mit on Inh. ch. I. sect. i. 30. 2 Dig. 519.

ship, a several, though unascertained right, as is the case where the authority of Jimuta Vahana prevails,(1) it is clear that there may be an assignment before partition; the alienee becoming a sort of tenant in common with the other parceners, admissible, as such, to a distribution by lot;(2) and even, with respect to an alienation of the whole, it would be good for the alienor's share, though, for his attempt to dispose of more, unwarranted, he would be liable to penal consequences.(3) The same eminent person was careful at the same time to admit the force of circumstances, under which, consent in these cases may be presumed; especially when the management of the property supposes a power of disposal; and, generally, when the acts, or even silence of the other sharers, may have given him a credit, and the alienee had no notice.(4) It is obvious that, in a multitude of cases here contemplated, fraud and collusion, on the part of the co-heirs, would be imputable; and, wherever this is manifest, the consequence is so likewise; once ascertained, it never is to succeed.(5) But, wherever they appear to have been unconscious of a transaction militating against their interests, the policy of the law would be, to exact of the

(1) Sricrishna, note to Jim. Vah. ch. II. 28.
2 Dig. 104.
Daya Crama Sangraha, ch. XI. 2, 3. 7.
(2) 2 Dig. 104.
(3) 2 Dig. 105.
Append. p. 284.—E.
Anunchund Rai v. Kishen Mohun Bunoja; Beng. Rep. 1805. p. 32.
Rajbulubh Bhooyan v. Mt. Buneta De; Id. ante 1805. p. 48.
(4) Append. p. 277.—C.
(5) Menu, ch. VIII. 165.

person so dealing with the manager, or other member of the family thus abusing his power, the most extreme caution; for, though the want of notice may be always pleaded on the part of the alienee, yet it is to be so pleaded as a circumstance only, and not in bar; nor, even as a circumstance, is it to be attended to but with much reserve; open, as it must always be, to argument, and leading to endless uncertainty, as well as to perjury;—so much better is it, that the rights of subjects should depend upon certain and fixed principles of law, rather than upon constructive inferences, by which justice is but too often misled, and loose and pernicious practices encouraged, to the subversion of property! In favour of a *bonâ fide* alienee of undivided property, where the sale or mortgage could not be sustained as against the family, such amends as it could afford would be due, out of the share of him, with whom he had dealt; and, for this purpose, a court would be warranted in enforcing a partition.(1) The necessity of inquiry, on the part of persons dealing with a family that may be undivided, will be naturally greater, where *minors* happen to be concerned; who, in general, will not be bound but by necessary acts, or such as are evidently for their benefit; the jealousy, in their favour, of the Hindu, corresponding with that of the English law.(2) To what specific charges, on behalf of particular members of the family, the joint fund is liable, will be the subject of a distinct chapter.(3)

(1) Append. p. 283.—C.
(2) Append. p. 282. 296.—C.
(3) Post, ch. X. p. 226.

II. As to the *right of partition*, it is far from commensurate with the interest existing in the property; numbers being eventually concerned, who cannot demand a division. Thus, the females of the family have a right to be maintained, and provided for out of it, as will be seen in the chapter just referred to.—But, since a wife cannot claim partition as against her husband, nor a daughter a share upon its taking place in the life of the father, (1) so neither can the one, nor the other, generally,(2) call for it after his death. This can be done by those alone, who are considered as *heirs;* in contradistinction to those, who have a claim only to be *maintained*,—of which latter description are the widow or widows of the deceased, leaving at his death male issue;—the principle being, that the right is co-ordinate with the gift of funeral cakes.(3) It may take place with reference to one only, leaving the rest as they were before, undivided; or, it may be general, all consenting. According to Menu, it has been thought to be prohibited during the life of the mother; his words being, that, " after the death of the father *and* " mother, the brothers may divide the paternal and mater- " nal estate." (4) But the author of the Smriti Chandrica has explained the meaning to be, that the death of the one, and of the other, has reference distributively to their respective property; so that the partition of the father's may be made, living the mother, and that of the mother's, while the father is yet in existence; there being no reason

(1) Ante, p. 117. 119.
(2) Ante, p. 142.
(3) Devala, 3 Dig. 10.
(4) Menu, ch. IX. 104. Daya Crama Sangraha, ch. VIII. 1.

to wait the demise of both, in order to divide what has belonged to either; neither having ownership in the other's property, where there are children. Jimuta Vahana, indeed, denies the lawfulness of distribution, while the mother survives,(1) but his opinion is construed by his commentator Sricrishna, and others, as importing only that such partition is wrong, not that it is null.(2) And the result of a careful examination by Mr. Colebrooke, of every material passage applicable to the point, was, that a division, living the mother, is competent throughout every province, that of Bengal excepted; where the prohibition, after all, is considered, by the best authorities, to be merely ethical; so that a division in breach of it is not even there invalid.(3) But, where the deceased has left *several* widows, with sons, more or fewer, by each; in such case, if the number by each be *equal*, in order to avoid the trouble of a more detailed distribution, the allotment may be to the mothers, leaving it to them to sub-divide among the sons, instead of dividing to the sons in the first instance; a mode of division called *Patni-bhaga*, or division by wives, in contradistinction to *Puttra-bhaga*, or the division by sons.(4) In this there appears nothing unreasonable; but the principle of this mode being, that the division to the wives is always to be an equal one, its effect becomes very different, where the number of sons by each *varies*. As, if one wife has one son, another three, and a third six, and each wife takes a third of the property, it is evident that the shares

(1) Jim. Vah. ch. III. sect. i. 13. 2 Dig. 78.
(2) Note to Jim. Vah. ch. III. sect. i 1.
(3) MSS. penes me.
(4) 2 Dig. 572. 575. 3 Id. 110.

of the sons, all by the same father, will be very different. So unnatural a mode of division, therefore, is allowed only among Sudras; nor, among them, but where there is a *custom* for it, which must of course be strictly proved;(1) though it is said to prevail in the Southern territories of India as much as did formerly the custom of *gavelkind* in Kent; thus, to a certain extent, but still in the Sudra class only, superseding the law of the *Sastras;* and, to this opinion, the frequency with which references of the kind appear to have been made, in the courts of the Company in the Peninsula, seems to give countenance.(2) The same text of Menu, last cited, is also referred to, as inconsistent with the right of a single co-heir to call for partition, since it speaks of "the *brothers* being assembled for the pur- "pose;"—but the construction has been different, and the right is distinctly affirmed by Jimuta Vahana.(3) It seems equally clear, that it may be enforced for the benefit of a *minor*, as where his coparceners are committing waste. In such a case, his guardian, or, in default of one, any relation not interested, would be competent to institute a suit for the purpose;(4) by which his share, being separated, must be secured for him till he come of age; otherwise, as against him, a partition would be void.(5) Upon the same footing, in this respect, with minors, are *absentees*, residing in a foreign country;(6) whose consent,

(1) Sumrun Singh *v.* Khedun Singh; Beng. Rep. 1814. p. 443; where the custom in question is called *Koolachar*.

(2) Append. p. 285 to 291. and Append. to ch. XII. p. 412.

(3) Jim. Vah. ch. III. sect. i. § 16.
Append. p. 293.—C.

(4) Append. p. 209, 210. 294.—C.

(5) Append. p. 296. C.

(6) Ante, ch. V. p. 116.

at the time, not being attainable, partition may proceed without it, the law enjoining the preservation of their respective shares, till the one arrive at majority, and the other returns; and this, in the case of the latter, to the extent of the *seventh* in descent, the right of parceners, remaining at home, being lost by dispossession beyond the *fourth*.(1) Admitting the consent of the mother, where living, not to be universally necessary, in those parts of India where it may be dispensed with, if a widow of a deceased co-heir happen to be pregnant at the time of his death, or be supposed to be so, either partition should wait, or a share should be set aside, to abide the contingency of her having an after-born son; failing which, it reverts, and is distributable, subject to the maintenance of the widow. Or, should such a birth take place subsequent, though not apprehended at the time, so as to have suggested the reservation of a share, an allotment must be made, by contribution among the parceners who have divided, making due allowances; as in case of partition in the life of the father. *Grandsons*, claiming by representation, distribution in their case must be settled through their deceased fathers; the aggregate sons of each being entitled *per stirpem*, not to an equality individually with their uncles and cousins.(2) And, as on partition by a father, so among co-heirs, any one, not wanting his share, may wave it by acceptance of a trifle,

(1) Jim. Vah. ch. VIII.
Vrihaspati, 3 Dig. 440. Id. 448. Id. 10.
Daya Crama Sangraha, ch. X.
Ante, p. 116, and Append. p. 330.—E.

(2) Mit. on Inh. ch. I. sect. v. 2. Catyayana, 2.—3 Dig. 7. Id. 82.
Append. p.

such acceptance operating as an estoppel against his claim ever after.(1)

III. *As to the property to be divided.*—Upon partition in the life of the father, there is, as has appeared, a material difference between the ancestral property, that has descended, and what has been since acquired; the distribution of the latter being subject, in some degree, to the will and discretion of the father;(2) but no such distinction exists upon partition among co-heirs, whose right attaches alike on both kinds, and among whom the division of every thing must be equal. Things destined to religious uses, indeed, remain in common; except that the *idols* of the family are, by some texts, assigned to the eldest son, deductions in favour of whom are, by the modern law, in general, obsolete.(3) Such is the general rule, founded on the supposition of the property not inherited having been acquired by the joint labour of all, or under circumstances rendering it common. But this not being always the case, and other considerations intervening to modify the right, this part of the subject will be best discussed, by considering, 1. What things are *impartible*, with the reasons rendering them so. 2. Such as are *partible* indeed, but in a *special manner*.

1. As to things vesting in an individual of a family, in exclusion of the other members, the instance of

(1) Menu, ch. IX. 207. Ante, ch V. p. 124.
(2) Ante, ch. V. p. 123.
(3) Jim. Vah. ch. III sect. II. 27.
Mit. on Inh. ch. I. sect. ii. 1. 6. Id. sect. III. 4.
Neelkaunt Raj v. Munee Chowdraen, Beng Rep. ante 1805. p. 63.
Append to ch. V. p. 121.

Regalities, and of *Zemindaries*, standing upon the same ground, has been already noticed;(1) of which it has been thought, however, that it is the *ruling power* only that is not subject to division; while the effects and private estate of a sovereign, like those of any ordinary individual, are in common, and distributable among all his sons.(2) This seems to be the only instance of the kind, the exception arising from the nature of the thing, sanctioned by custom. It may be convenient, however, to advert here to some other subjects, upon which doubts have been entertained, upon no solid foundation. Such, upon a supposed analogy to a *corody*, as well as on the ground that partition of them among a number, for whose maintenance they cannot adequately provide, would defeat their object, are the *Mara Vurtanah*, *Bazar Vurtanah*, and other dues accruing to the *conicopoly* of a village; which, though agreed to be heritable, have been denied to be divisible.(3) But a *corody*, being the grant of an annuity assigned upon some particular fund,(4) if made to one of an undivided family and his heirs, with nothing in it to control the operation of the law, would, upon the death of the grantee, leaving sons, descend in common, and be divisible among them on partition.(5) It is the same with a village granted in *Srotryum*,(6)—a favourable tenure, conferred occasionally by government, in consideration of the indi-

(1) Ante, p. 175.
(2) Append. p. 263.—E.
(3) Append. p. 297.—E.
(4) 2 Dig. 163.
(5) Catyayana, 3 Dig. 375.
(6) Append. p. 299.

vidual merits of the grantee. Supposing the grant to be exclusive, it would not be partible among collaterals;(1) and consequently, upon the death of the *Srotryumdar*, leaving sons, their uncles not sharing in the inheritance, it would descend (not to the eldest merely, but) to all the sons in common. And, as to this leading to endless divisibility, the objection, being inherent, cannot be helped, unless obviated by the terms of the grant, importing a particular limitation; since, otherwise, the law must prevail. Nor is the case of the conicopoly distinguishable from that of the various offices attached to the pagodas, and other religious establishments of the natives, the rights of Brahmins attendant upon funerals, and the like; which, however some of them may be disposable by regulating the periods of their enjoyment, as they are in general hereditary, so are they likewise common and divisible;(2) as are also *Jaghires*.(3) But lands endowed for religious purposes are not inheritable, and consequently not divisible, though the management of them may be so.(4) Impartibility results also from *appropriation;* upon which ground, as well as to obviate the inference from their having been obtained at the expense of the joint estate, it has been thought right (it seems) expressly to declare, that *wives* continue to belong to their respective husbands, upon, and after partition. Such is the explanation given

(1) Purtaub Bahauder Sing v Tilukdhasee Sing, Beng. Rep. 1805. p 101.

(2) 3 Dig. 375.—Append. p. 302.—C.
Mt. Rajoo v. Mt. Buddun, Beng. Rep 1812. p. 327.
Kalachund Chuckurbuttee v. J. Chuckurbuttee, Id. 1809. p. 211.

(3) Append. p. 263.—E.

(4) Elder widow of Raja Chutter Sein v. Younger do. of do.; Id. 1807, p. 103 Ante, p. 173.

of "women," in the several texts enumerating things that are exempt. They are said to respect the wives of the co-heirs, the female slaves of the family being clearly partible.(1) Upon this ground rests the exemption of the clothes and jewels of the different members of the family, whether male or female;(2) but it is confined to such as have been usually worn; habitual wear (says Jagannatha) being considered as a mode of acquisition.(3) So, by the English law, under similar circumstances, it is matter of reference, in the Court of Chancery, to the Master, to inquire what jewels, or other things, a lady is entitled to, for her *paraphernalia;* and that the same be retained by, or delivered to her. But, by the Hindu law, clothes of value, as court-dresses and the like, worn only on particular occasions, in which all are interested, remain, on partition, as before, for common use, unless sold; in which case, the proceeds are distributable.(4) And, even of common apparel, if one happen to have much more than the rest, the difference must be adjusted, excessive disparity being in all things forbidden.(5) The same principle of appropriation extends to *slave-girls;* with respect to which, where there are in a family several, of whom any of the members have been in the habit of employing one in particular to rub his limbs, or for whatever other purpose, his property in her may be confirmed,

(1) Jim. Vah. ch. VI. sect. ii. 23, 24. 3 Dig. 382.
(2) Menu, ch. IX. 219. 3 Dig. 372.
Jim. Vah. ch. VI. sect. ii. 14.
Mit. on Inh. ch. I. sect. iv. 17. 19.
(3) Daya Crama Sangraha, ch. IV. sect. ii. 13.
(4) 3 Dig. 376, et seq. Id. 381, et seq.
(5) 3 Dig. 373. Append. p. 304. And Append. to ch. X. p.

when they come to divide; without regard to any accidental difference between her and the others, as to age, strength, or other qualities; provided that, upon the whole, the partition be equal.(1) If there be but one, it can only be done by *compensation*.(2) And, where there being but one, there have existed no such appropriation, she may be distributed by computation of time and work (*alternis vicibus*), like any thing else physically indivisible,(3) and which, therefore, where many are concerned, can only be enjoyed by turns, or in common, subject to specific distribution by means of sale.(4) With respect to women of the kind alluded to, that have belonged specially to the father, or other ancestor, they are not to be distributed, but maintained, as long as they continue to conduct themselves irreproachably.(5) And, as to other things that were his, in a peculiar sense, such as clothes and ornaments, his bed, with its furniture, as well as his conveyance and the like, "after perfuming them "with fragrant drugs, and wreaths of flowers," they are directed to be given to the person partaking of food at his obsequies.(6) Any other particular article, as a horse, or carriage, may be exempt on the same ground; and, analogous to what will be stated hereafter, with respect to acquisitions by science,—books, tools, and implements

(1) Menu, IX. 219. Gautama, 3 Dig. 380. Id. 374.
Jim. Vah. ch. VI. sect. ii. § 24.
Mit. on Inh. ch. I. sect. iv. § 22.
(2) 3 Dig. 384.
(3) 2 Dig. 505. Vrihaspati, 3 Id. 379.
(4) Jim. Vah. ch. I. 10. 3 Dig. 373. 379, et seq.
(5) Mit. on Inh. ch. I. sect. iv. § 17. 22.—Id. ch. II. sect. i. § 7. 28.
(6) Mit. on Inh. ch. I. sect. iv. § 17, 18. 22.

of art belong generally to those who can best employ them, the rest taking to other parts of the property, unless where the whole consists of nothing else; in which case there must be a general distribution, or a sale, and equal division of the proceeds. But the most general ground of impartibility is *separate acquisition.* The common stock (as has been already observed) may consist either of ancestral, or of acquired property, or of both; and, having been augmented or improved, the benefit, on partition, as well as during the period of joint occupancy, accrues to all alike, without regard to the degree in which each may have contributed to its enhancement. It is like *accretion*, under the civil law. The property is substantially the same that it was, though rendered more valuable by cultivation and care.(1) But a member of an undivided family, continuing such, and enjoying, in common with his co-heirs, every advantage incident to their unseparated state, may, in the mean time, acquire separate property to his own particular use; in which, upon a division, they will have no right to share. But the acquisition, in order to be so, must have been an original and independent one; the essence of the exclusive title consisting in its having been made by the sole agency of the individual, without employing for the purpose what belongs in common to the family. If the family property have been instrumental to it, it vests in

(1) Mit. on Inh. ch. I. sect. iv. 30, 31. 3 Dig. 387.
Purtaub Bahauder S. v. Tilukdhasee S.; Beng. Rep. 1807. p. 101.
Sheopershaud S. v. Kulunder S.; Beng. Rep. ante 1805. p. 82.

the family.(1) Whether it have been so, to the effect of rendering joint that acquisition which was, in fact, the product of an individual, may be sometimes a question of nicety, suited to the subtle disquisition of Hindu lawyers. Assuming as a Hindu principle, that *de minimis non curat lex*, (it being said, on another occasion, that "things of ordinary value may be given up, "*for they are mere chaff*;"(2)) in the instances adduced, of a coparcener, in the practice of separate agriculture, taking a rope for his plough out of the common stock, or of one begging alms, in a pair of shoes that had belonged to it,(3) it might be disputed, whether such contributions could invalidate his pretensions to an exclusive right in property so acquired. The question, in these cases, must be one of discretion.(4) It seems agreed, that maintenance in the family, during the period of the separate acquisition, though it contribute to the end, is not alone sufficient to affect it with a joint character, the expenditure for the purpose being incidental.(5) As well (says an author) might it be said that it should be common, inasmuch as the acquirer "sucked his mother's milk."(6) So, though there should have been ever so considerable a disbursement from the family property, on his initiation, or

(1) Menu, IX. 208.
Jim Vah. ch. VI. sect. 1. § 5. 10. 21 24.
(2) 3 Dig. 381.
(3) 3 Dig. 358.—Append p.
(4) Append. p. 306.—E.
(5) Jim. Vah. ch. VI. sect. 1. § 47. Append. p. 310.—E. contra.
(6) Viswerupa, Jim. Vah. ch. VI 1. § 48.

marriage, neither will this subject his individual gains to be participated;(1) because every thing of the kind is collateral to them, and not with the view in question; whereas, to take the case out of the rule, where there has been no conjoint labour, the common fund must have been directly instrumental.(2) The rule applies to all the various modes by which property is acquirable, as agriculture, merchandise, service, science, and military achievement; with gifts, or presents; as also to whatever may have been recovered, by an unseparated member, of family property, which, in the time of the ancestor, had been lost.(3) But, with regard to a gift, in order to its vesting separately, it must have been pure in its motive, and personal in its object; for, if it were in return for something previously given, it would be liable to be considered as common property, common property having been used in obtaining it.(4) Not that wherever there have been mutual gifts, the gift to the coparcener is necessarily partible. It depends upon whether the one have been in consideration of the other, a present made, with a view to a return.(5) A gift under such circumstances loses the nature of one; *do ut des*, it is too like a contract, the result of which is common. *Nuptial* gifts, which a man receives with his wife, are

(1) Jim. Vah. ch. VI. sect. i. § 49.
(2) Jim. Vah. ch. VI. sect. i. § 16. 46, et seq. 3 Dig. 552.
(3) Jim. Vah. ch. VI. 1. 36. Mit. on Inh. ch. I. iv. 6.
(4) Menu, IX. 206. Jim. Vah. ch. VI. i. 7, et seq.
Yajnyawalcya, 3 Dig. 343. Mit. on Inh. ch. I. iv. 1.
Nareda and Vyasa, 3 Dig. 344.
(5) 3 Dig. 363, et seq.

particularly noticed as exclusively his;(1)—which is the more remarkable, as the funds of the family must bear the expenses of the marriage; but, as already intimated, this does not render them partible, the expenditure being incidental only. So, as to what is received at a marriage, in the form termed *Asura*, at which presents are made by the bridegroom to the father, or kinsmen of the bride.(2) It must be exclusive also to the donee; for, if it be made on the ground of his being the son of a particular person named, all the other sons (if any) participating in the consideration, the effect of common relationship prevails; and it is the same as though it had been expressed as for all, in which case there could arise no question as to the effect.(3) It is of no importance who the giver is, and therefore, upon principle, a gift by a stranger through commiseration should be the donee's; yet such a gift enures to the benefit of the family of which he is a member, though not referable to the joint funds; and *treasure found* is another exception; both *alms* and it being, at all events, partible.(4) The instance of presents is of this importance, that it is the most usual mode in which acquisitions are made, without expenditure;(5) particularly among the Brahmins, with whom they are one of the seven recognized means of acquiring property, though not a commendable mode, even when received

(1) Menu, IX. 206. Jim. Vah. ch. VI. sect. i. § 9. 33.
3 Dig. 363. Daya Crama Sangraha, ch. IV. sect. ii.
(2) Mit. on Inh. ch. I. sect. iv. § 6.
Menu, ch. III. 25. Ante, p. 42.
(3) Sricrishna, note to Jim. Vah. ch. VI. sect. i. § 51. 3 Dig. 101.
(4) Sricrishna, note to Jim Vah. ch. VI. sect. i. § 37.
(5) Jim. Vah. ch. VI. sect. i. § 8. Menu, X. 115.

from respectable persons; while acceptance of them from low ones is so much the contrary, that it requires to be expiated by abandonment and rigorous devotion. (1) And, though the benefit of them belongs, in point of law, to the individual, in practice, partition of gifts is said to be not uncommon, particularly among the liberal; founded, it may be, sometimes, on the mistake of supposing an acquisition to be subject to partition, simply because it was obtained by an unseparated coparcener, according to an ancient opinion, that has been refuted. (2) Next, as to *property recovered;* at whatsoever time lost, and referable to whatsoever title, so it be family property, (3) being redeemed, without use of the common stock, it belongs exclusively to the recoverer, notwithstanding the former right. (4) The recovery, however, according to some authorities, (5) must have been with the privity of the co-heirs, unless there appear to have been an abandonment by them, of which silent neglect on their part may be evidence. (6) It must at least have been *bonâ fide*, that is, not in fraud of their title, by anticipating them in their intention of recovering it. Still less would it be available to exclude partition, if pursued in face of

(1) Menu, ch. XI. 24. 42. 70. 254.
(2) 3 Dig. 401. Jim. Vah. ch. VI. sect. i. § 53. Id. sect. ii. § 13. 53.
(3) Sricrishna, note to Jim. Vah. ch. VI. sect. i. § 33. Id. ii. 37.
(4) Menu, IX. 209. Yajnyawalcya, 2. 3 Dig. 343.
Mit. on Inh. ch. I. sect. iv. § 1.
Jim. Vah. ch. VI. sect. i. § 40.
Daya Crama Saugraha, ch. IV. sect. ii. 11.
(5) Mit. on Inh. ch. I. sect. iv. § 2.
Chandeswara, Contra. 3 Dig. 364, 365.
Append. p. 311.—C. and E.
(6) 1 Dig. 214.

an express injunction on their part. (1) It is laid down by Jimuta Vahana, and in the Mitacshara, on the authority of Sancha, that land is not included in this rule; a position not admitted by Jagannatha. (2) As to gains by *science*, the rule applicable to these embraces a variety of particulars, the root (*vid*) from which the Sanscrit word (*vidya*, science) is derived, signifying any knowledge, or skill. (3) "In fact, (says Jagannatha,) in all cases whatsoever, "wherein superior skill is required, the wealth gained is "technically denominated the acquisition of science." (4) Hence, beside what may be gained by it in its more direct and appropriate sense, it includes what is received by a teacher from his pupil, or by a priest from those for whom he has officiated; a fee for an opinion in law, or upon any other subject on which the receiver may have been professionally consulted; a literary prize, or a reward for reading in a superior manner; not to mention what is won at play. (5) It extends also to the liberal and elegant arts, among which working in metals, long practised in the East, is enumerated, with music and painting. Thus, having taken gold, for instance, and made it into bracelets, the ornament, so far as respects

(1) 3 Dig. 367. Daya Crama Sangraha, ch. IV. ii. 8, 9.

(2) Sancha, 3 Dig. 375. Yajnyawalcya, Id. 343.
Jim. Vah. ch. VI. sect. ii. § 38, 39. Mit. on Inh. ch. 1. sect. iv. § 3.
3 Dig. 367.
See also, Beng. Rep. ante 1805. p. 36, which seems to have been a case of land.

(3) Jim. Vah. ch. VI. sect. ii. § 17.

(4) 3 Dig. 339.

(5) Jim. Vah. ch. VI. sect. ii. § 1 to 13. Catyayana, 3 Dig. 333.
Daya Crama Sangraha, ch. IV. sect. i. 13, et seq.
2 Dig. 65. 179.

the material, is common and partible; while the value, superadded by the skill of the artist, regarded as an acquisition made through science, is subject to the rule applicable to that particular subject. (1) With respect to gains by *valour*, falling under the same consideration, (2) by these, technically understood, is not meant military pay, which, as to its partibility, is not distinguishable from any other ordinary acquisition; (3) but such, where extraordinary prowess has been displayed; being resolved by Menu,(4) and others, into the reward of a gallant action in the field, or into spoil taken under a standard, after a rout of the enemy; of which latter it is remarkable, that, as with us, it does not vest without the assent of the king.(5) By the ancient law, acquisitions by the elder brother, without use of the family property, were partible with such of the rest as had cultivated learning; on the ground that, after the death of the father, being in *loco parentis*, he could not acquire for himself exclusively; but this consideration of the elder brother gradually subsiding, the distinction is worn out, and he stands, in this respect, as in others, now, upon the same footing with any other. (6) Wherever there has existed a use of the joint funds, or a common exertion of the co-heirs, in either of which cases the acquisition is par-

(1) Jim. Vah. ch. VI. sect. ii. note to § 1, and § 11.
(2) Jim. Vah. ch. VI. sect. 1. § 10. 12, and note to § 51.
(3) 3 Dig. 346, et seq.
(4) Menu, cited in 3 Dig. 367.
Catyayana, cited in Jim. Vah. ch. VI. 1. 20.
(5) 2 Dig. 155. 158.
(6) Menu, IX. 204. 109, 110.
3 Dig. 371.
Jim. Vah. sect. i. § 54.

tible, the acquirer takes a superior share. In all other instances, that of property recovered excepted, a share, *extra* the number that is to divide, is given to the special acquirer, beyond his equal share; and, if more than one have been concerned with him, they participate in the excess.(1) In the instance of *property recovered*, the special claim of the recoverer is to a fourth only, instead of to a double share; the merit of recovering what has only been withheld, not being considered equal to that of making a new acquisition.(2) But whether by this is to be understood a fourth of the whole property recovered, or only a fourth of an equal share, added to a share, seems uncertain.(3) Claims to extra shares may of course be adjusted, with consent of parties, being sometimes treated as discretionary in amount.(4) But the specific measures are as has been stated. This effect of the use of the joint stock, in rendering separate acquisitions, in general, common, is attended sometimes with injustice, where, in cases of small patrimony, large fortunes are made by the unaided exertions of enterprising parceners; of which the benefit may eventually be shared by drones, who have in no degree conduced to their accumulation.(5) Nor, to obviate this, is there any resource, where timely separation has been omitted; a right to the benefit of each other's labours being incident, where copartner-

(1) Jim. Vah. ch. VI. i. 28. Mit. on Inh. ch I. iv. 29.
Vasishta, 3 Dig. 356. 405.

(2) Jim. Vah. ch. VI. sect. ii. 39. 3 Dig. 366, 367.
Radhachurn R. v. Raghoonunda R.; Beng. Rep. ante 1805. p. 36.

(3) Jim. Vah. ch. VI. sect. ii. 38. Mit. on Inh. ch. I. iv. 3.
Note to 3 Dig. 366. Beng. Rep. ante 1805. p. 36.

(4) Append. p. 317.—E.

(5) Ante, p. 126. Append. p. 360.—C. and E.

ship has continued, and the joint property been instrumental. But, where the latter has not been the case, the claim to participate fails, though made by an unseparated member.(1)

2. As to things *specially divisible*; they are distinguishable from such as are *impartible*, in that the latter are so upon the grounds that have been stated, the former, in point of fact, being of a nature to render division inconvenient, if not, as is often the case, impracticable; and for which, therefore, a virtual partition is substituted, where a direct one cannot easily, if at all, be had. Such are a road, a way, pasture for cattle, or a well; with other instances that have been already incidentally noticed;(2) and of which the number and kind are indefinite, liable to be modified by custom, whether local, or applicable to a particular class or community;(3)—and, in general, where this does not interfere, equality, subject to convenience, being the object, the means of attaining it appear to be left very much to the suggestions of reason and good sense, having regard to the circumstances of families, and the nature of the property to be divided.

IV. *How partition takes place.* Under this head are to be considered *first*, the modes that may be resorted to for partition; *secondly*, the rules to be observed in making it.

1. As, on partition by a father, so upon that which takes place after his death, beside the method by casting

(1) Soobuns Lal v. Hurbuns Lal, Beng. Rep. 1805. p. 7.

(2) Append. p. 305.—C. 3 Dig. p. 372, et seq.—Ante, p. 188. Daya Crama Sangraha, ch. IV. sect. ii. 13, et seq.

(3) Catyayana, 3 Dig. 375.

of lots,(1) arbitrators may be employed, in which case it is public; or, it may be arranged privately among the parties, either with, or without the mediation of friends.(2) In either of the last mentioned courses, the law prescribes an instrument in writing, called by Vrihaspati "the writ-"ten memorial of distribution," but it has not rendered it indispensable.(3)—It may be here remarked, that the instruments and agreements of the Hindus are, in point of form, models in their way. Penned in general by the village accountants, (conicopolies,) while they express every thing that is material, they do so with a compactness and precision, not easy to be surpassed. A regular instrument of partition, being entitled according to its purport, the things distributed by it are specified by name, and may be inventoried on the back, the amount being noted also in figures, to preclude any fraudulent insertion subsequent. But they are considered to be best enumerated in the body; and this, so as to shew what each has received, that the fairness of the division may appear. With the date, the names of the parceners are inserted, designated by those of their fathers, the same names, among Hindus, being usually common to many; for which reason, the paternal names of the drawer of the instrument, and of the witnesses to it, are added. Where it is *olograph*, there is the less necessity for witnesses; but they are in all cases recommended.(4) The greatest

(1) 2 Dig. 518.
(2) Append. p. 319.—E.
(3) 3 Dig. 408. Append. p. 321. 323.
(4) Vrihaspati, 3 Dig. 408, with the commentary.
Yajnyawalcya, 1 Dig. 23.

credit attaches to such an instrument, executed in the presence of, and attested by the Raja, and his officers;(1) by which is to be understood simply a public, authenticated attestation. What the law expects in general is, that it should be attested by kinsmen; the want of whom, however, and the consequent substitution of more distant relations, or even of neighbours, is always open to be explained.(2) Such in fact is the order, in which witnesses for this purpose are classed; *kinsmen* being described as persons allied by community of funeral oblations, or as sprung from the same race; *relations*, as maternal uncles, and other collateral and distant connexions of the family.

2. As to the partition itself, accounts being previously settled, and debts and other charges provided for,(3) whatever course be adopted, the division of all, acquired as well as ancestral, must be intrinsically the same, *i. e.* in general, equal, without deductions;(4) making allowance for disqualifications resulting from defects, moral and physical.(5) Even under the old law, the right of primogeniture, on partition, operated only upon what had descended, not upon that which had been acquired. With regard to this, as unequal augmentation of that which is ancestral leaves it still what it was, equally divisible, so, whatever is entitled to be considered as joint, is alike partible among all, without attention to the degree in which individuals may have contributed to its production;

(1) 3 Dig. 416.
(2) 3 Dig. 414.
(3) Post, ch. X. p. 226.
(4) Ante, p. 122.
(5) Post, ch. IX. p. 213.

subject always to the special claim of any one, for extra acquisitions.(1) So, where the enjoyment of what is in common may have been unequal, that of some having been greater than that of others, the shares upon a division are still to be the same, the law taking no account of greater or less expenditure, unless the difference be such as to exclude all idea of proportion, the object entirely selfish, or the circumstances of a kind to impute fraud.(2) If the family of one brother, being more numerous than those of the rest, have, in the maintaining of it, incurred a greater expense, so it has been proportionate, and not excessive, the difference is not to be regarded when they come to divide; and the same principle applies as to what may have been laid out on the nuptials of a daughter, or the initiation of a son,(3)—occurrences, in Hindu families, which, it will be seen, constitute a charge on the joint property, where they are undivided.(4) But, if one, giving a loose to pleasures, in which the rest have not participated, have thereby broken in upon the common fund to an extent not to be justified, he will, upon partition, receive his portion diminished by what he has dissipated; though it is said, that if more than the amount of his share have been so expended, the law does not direct that the excess shall be considered as a debt.(5) So, in the Bengal provinces, but not in Southern India, an unproductive

(1) Menu, IX. 205. 2 Dig. 584.
Mit. on Inh. ch. I. sect. iv. 31. 3 Dig. 387.
Append. to ch. p.
(2) 3 Dig. 391, to the end of the section. Append. p.
(3) 3 Dig. 108. Daya Crama Sangraha, ch. VII. 29.
(4) Post, ch X p. 230.
(5) 3 Dig. 299. Vid. post, p. 218.

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parcener may be shared out of the property acquired; but must receive his portion of the original stock descended.(1) It is the same of a loan or gift, even for a good (as for a religious) purpose, if made by a parcener on his sole account; or of a sale, a purchase, or an hypothecation; the principle being, that the patrimony, or family property is not to be arbitrarily aliened; otherwise, where the purpose and end have been the support, the interest, or the spiritual benefit of the whole.(2)

V. With respect to *the proof of a disputed partition*, though the law favours separation, by which religious ceremonies are multiplied,(3) it presumes joint tenancy as the primary state of every Hindu family; and this especially among brothers, it being most natural for such "to dwell "together in unity." Important as the question may be to strangers, appearances as to the fact are not always to be relied upon. The legal idea of *undivided*, regarding, as it does, *property*, a family may be separated as to residence, meals, and ceremonies, so as to seem even to their neighbours, as well as to others, to be divided, without being so; remaining, in truth, united in interest. As, on the other hand, having parted property, they may have become legally divided by a severance in their worldly concerns; and yet, continuing to live and eat together,(4) performing also in common their solemn and accustomed rites, they will appear to be still united, though,

(1) 3 Dig. 67. Ante, p. 126.
(2) 2 Dig. 103. 3 Dig. 391, et seq. Append. p. 272. 274.—C.
(3) Menu, ch. IX. 2 Dig. 534. 3 Id. 76.
(4) Jim. Vah. ch. VI. sect. i. § 27.

in reality, and to legal purposes, they are no longer so.(1) This renders it, moreover, in many cases, where contested, (as it often is,) difficult to determine, whether the family be, or be not, a divided one. The question may arise among themselves, one member claiming partition, while the rest insist upon its having already taken place, at a time past. Or it may be raised by a creditor, having an interest in considering it as undivided, whereby he extends the fund for the payment of his debt, the credit having perhaps been given under this idea, though in truth, perhaps, a mistaken one. The obscurity in which it is sometimes involved, productive, as it is, not only of eventual litigation, but of occasional fraud and injustice, may be attributed to the law, allowing partition, without the presence of witnesses, or intervention of any deed; thus leaving a transaction of such possible consequence to others, as well as to the family, to be performed in secret, resting in the breasts, and in the consciousness alone of the parties. Where this has been the case, and the interest of any one is opposed to the claim, the fact remains to be collected from circumstances; observing, wherever the English rules of evidence do not prevail, the distinctions that have been noticed, as to the order and credit of the witnesses.(2)

The presumption raised by the law, from the natural state of families, in favour of union, may be destroyed, by evidence of separate acts, inferring a contrary one,

(1) 3 Dig. 417, et seq.
Khodeeram Serma v. Tirlochun, Beng. Rep. ante 1805, p. 37.
(2) Ante, p. 199.

and amounting to proof of partition having taken place. Such are for this purpose religious ones, the religious duty of coparceners being single;(1) dressing food; transactions inconsistent with the idea of their continuing united, as making mutual loans, sales, purchases, and other contracts; or becoming sureties, or witnesses for one another, on subjects of property.(2) To which, as indicating the understanding of neighbours, may be added, delivery to them severally of provisions, and other dues, by the village peasants.(3) Of each of these a little more at large, in their order.

Of the religious duties of the Hindu, some are indispensable, others in their nature voluntary. Of the latter sort are sacrifices, consecrations, the stated oblations at noon or evening, with whatever else there may be of a similar kind, the performance or non-performance of which respects the individual merely. It being, under any circumstances, competent to discharge these jointly or severally, it follows that the performance of them, the one way or the other, affords no inference as to the state to be investigated. The proof in question results from the separate solemnization of such, the acquittal or neglect of which is attended with consequences beneficial, or otherwise, to the individual, in his capacity of *Housekeeper*, *(Grihasta,)* or master of a family, the third and most important order among the Hindus. Of this kind are, among others, the five great sacraments,

(1) Mit. on Inh. ch. II. sect. xii.
Nareda, 3 Dig. 407. 417. Append. p. 321 to 325.—C. and E.
(2) 3 Dig. 421. Vrihaspati, Id. 427. Yajnyawalcya, 1 Dig. 228.
(3) 3 Dig. 429.

in favour of "the divine sages, the manes, the gods, the "spirits, and guests," enumerated, described, and enforced by Menu; it being of such, of which it is said, that of undivided brethren the religious duty is single, *i. e.* performed by an act in which all join; severing in them, and performing them separately in their respective houses *after* partition.(1) Still, such separate performance is not conclusive; it is a circumstance merely.(2)

Reciprocal gifts and mutual contracts are inconsistent with the relation of parceners; in which, generally speaking, every thing is in common. They become evidence, therefore, where they appear, of partition having taken place. So, with regard to income and expenditure, with the infinite dealings in which men's interests are concerned, carried on without consulting each other, and this publicly, and without reserve; the same inference arises.(3) As to separate acquisition, it concludes nothing, since, as has been seen,(4) it may take place, consistently with copartnership. And, with respect to any one, or more, of the instances specified, they are but evidence; though the concurrence of all, to constitute proof, is not requisite.(5) The one the most to be relied upon is, the taking food, separately prepared. Yet, as it may be matter of convenience, among parceners

(1) Menu, ch. III. 69 to 81. Anon. text cccIxxxviii. 3 Dig 420. 3 Dig. 417, 418.
(2) Append. p. 325.
(3) 3 Dig. 418.
(4) Nareda, 3 Dig. 417. Id. 419
(5) Jim. Vah. ch. XIV. 10.

having large families, to have separate cookery, dressing their victuals apart, this also is but a circumstance, which may be explained; or its effect, in point of evidence, may be removed, by shewing not separate, but joint preparation of grain, for oblations to deities, and the entertainment of guests, as well as for other purposes which, among united co-heirs, are essentially common. But, in general, a distinct preparation of food, after an agreement to separate, proves partition, and the previous agreement may in some cases be inferred from that sole evidence; but more satisfactorily in proportion as a greater number of the indicated circumstances concur.(1)

Nor can brothers undivided, or other parceners, become sureties, or give evidence for each other, any more than make mutual loans. The connexion, so subsisting, forbids every thing of the kind. With regard to their being witnesses for, or against each other, the restriction does not apply to cases of slander, violence, or the like; but only to matters affecting the joint interest, and so raising a direct objection to their competency. Testimony therefore between them, admitted in such a case, implies partition.(2) Jagannatha, in the close of his chapter on the subject, admitting that liberties may be taken with the patrimony, inconsistent with the relation under which it is held, so as to render equivocal, as proof of partition, many of the acts that have been alluded to, sums up the whole

(1) 3 Dig. 421. 428.
(2) 3 Dig. 421, et seq.

in the following words. "In a doubt (says he) re-
"specting a prior distribution, among those who se-
"verally transact commercial affairs, and the like, but
"without having separated their preparation of food by
"a previous agreement, what (he asks) is the rule
"of decision, if the dispute concern that property, to
"which the transactions relate?—Deduce the principle
"of decision (he answers) from reciprocal gift and re-
"ceipt: for, in that case, donation, which is an act
"done for a spiritual end, has been made in contem-
"plation of abundant fruit from liberality to a kinsman.
"Again, the people know whether these co-heirs have
"separated their preparation of food by previous agree-
"ment or not. Again, do the peasants deliver to them,
"severally, the provisions, and other dues from their
"village? Hence also a principle of decision may be
"deduced. In like manner, the question may be de-
"termined by their annual obsequies for a deceased an-
"cestor, and by their worship of *Lachsmi*, or other
"deities, and the like." On this topic Jimuta Va-
hana adds,(1) "this, and similar acts, can only be
"done severally by divided co-heirs; any one of
"them must therefore be considered as a presumptive
"proof of partition, on failure of written, and oral evi-
"dence."(2)

VI. It remains to consider some *matters subsequent*, supposing a partition to have taken place. In general, once

(1) Jim. Vah. ch. XIV. 9.
(2) 3 Dig. 428.

made, it cannot be opened.(1)—Yet, 1. if effects that were not forthcoming at the time, be afterwards *recovered*, in a way to warrant a claim to participation; and, 2. much more if *concealment* had taken place, a discovery leads to a second division.(2) In the latter case, the tenderness of the law, as to the means of ascertaining the fact, is remarkable, as if any thing like an exertion of authority for the purpose were, if possible, to be avoided; by which, however, is to be understood only, that persuasion is to be used in the first instance, rather than coercion;(3) it being admitted that, the former failing, more effectual ones may be resorted to, such as *ordeal*;(4) a mode of course not to be adopted in our Courts, in which trials and processes of all sorts are to be according to the provisions of their respective charters, or commissions. All authorities at the same time agree, that, to justify an ultimate proceeding of the kind, in order to force a discovery from an unwilling concealer, there should be a preceding inquiry, founded, not upon the light suspicion of any individual, but upon circumstances, the law forbidding hasty recourse to ordeal.(5) This delicacy, suitable to the intimate relation of the parties, is by some referred to the consideration, that *concealment* is simply a moral offence,(6) as opposed to *theft*, which is defined to be the taking of another's goods, where there exists in the taker

(1) Vrihaspati, 3 Dig. 399. Id. 400.
(2) Catyayana, 4. 3 Dig. 398. Id. 401. Jim. Vah. ch. XIII. § 7.
(3) Jim. Vah. ch. XIII. § 7.
(4) Catyayana, 3 Dig. 395. Id. 402.
(5) 3 Dig. 397.—See also, 2 Id. 9. Culluca Bhatta, 1. Id. 440.
(6) 3 Dig. 391.

no common property.(1) On discovery, distribution takes place, subject to the question, whether the concealer, who would have fraudulently appropriated what he kept back, is to receive, with the rest, an equal share. That he should, may be cited a number of authorities, including that of Jimuta Vahana:(2) to these may be opposed the reasoning of the Mitacshara,(3) with the analogy of the text of Menu,(4) which, in the case of an elder brother defrauding his younger ones, visits him at once with punishment and privation. Nor, upon the principle of its being still undivided, is he, by whom it has been attempted to embezzle, answerable for what he may have used, provided his consumption have not been more than would have subjected him to account, in the ordinary course of the employment by one coparcener, of property belonging in common to himself and the rest.(5) But, independant of concealment;—3. Wherever, from any cause not understood at the time, the division proves to have been *unequal*, or in any respect *defective*, it may be set to rights, notwithstanding the maxim that, "*once is partition of inheritance made*;"(6)—a position, that supposes it to have been fair, and made according to law.(7)—4. Distinct both from fraud and mistake,

(1) Jim. Vah. ch. XIII. § 8, 9. 15, and note.
3 Dig. 397. Commentary on Yajnyawalcya. Id. 401.
(2) Jim. Vah. ch. XIII. § 2. 3 Dig. 396, 397, 398.
Daya Crama Sangraha, ch. VIII. 2.
(3) Mit. on Inh. ch. I. sect. ix. § 4, 5. 12.
(4) Menu, IX. 213.
(5) 3 Dig. 402.
(6) Menu, IX. 47.—3 Dig. 214.
(7) Menu, IX. 218.—Jim. Vah. ch. XIII. § 4, 5.
Catyayana, 3 Dig. 398. Id. 397. 399, 400, 401.
Daya Crama Sangraha, ch. V. 22, 23. and VIII. 4.

is the case, where, the partition not having been completed when it was begun, a *residue* remains undivided; upon which the rule is, that while it continues in the possession of any of the co-heirs, the title to their shares, of such as remain at home, is preserved to them to the fourth generation; and, where the ancestors of any one have been so long absent abroad, it is good as far as the seventh.(1) But, whether, in other respects, an undivided residue shall be subject to rules of succession relative to separated, or unseparated brothers, a difference of opinion exists.(2) In the mean time, pending its suspension, contrary to the course while the family continues generally undivided, the acquisition of a separated parcener, by means of such residue, is exclusively his; subject to an equitable allowance by him for the use he may have made of it; analogous to the case, as among partners in trade, to whom in general the law of co-heirs bears no affinity.(3)—5. Not only may an original partition be reformed, by means of a supplemental one, but there may be an entirely new one, upon a *reunion* of any of the separated parceners, competent to the purpose;(4) and this, as well after partition by a father, as among co-heirs.(5) The deduction to which, by the old law, an elder brother was entitled on an original partition, merged on a reunion,

(1) Jim. Vah. ch. VIII.
Devala, 3 Dig. 10. Vrihaspati, Id. 445.
Ante, ch. V. p. 116.
(2) Append. p. 322.—C. Mit. on Inh. ch. I. sect. vi. 2. and 16.
(3) 3 Dig. 401.
(4) Mit. on Inh. ch. II. ix. 3. Vrihaspati, 3 Dig. 512. Id. 533.
Daya Crama Sangraha, ch. V. 3, et seq.
(5) Jim. Vah. ch. XII. 3.

reviving to him upon re-partition, being a privilege he could enjoy but once.(1) A reunited parcener dying while the reunion continues, leaving no issue, but a widow, according to the Mitacshara,(2) she is entitled to maintenance only, the deceased's share vesting by survivorship in his coparceners; it being affirmed by Vachespati Misra,(3) that all texts suggesting her succession, in preference to them, relate to the estate of a husband who has made a partition with his brothers; while Jagannatha, reviewing the various opinions that exist upon the point,(4) contends that there is no difference in this respect, whether divided, or undivided: so that the schools differing, it may be liable to be differently determined, according as the one or the other prevails, in the Bengal provinces, or in those depending on the government of Madras. Other claims being disposed of, if the surviving reunited parceners be partly of the whole, and partly of the half blood, those of the whole take in exclusion of those of the half:(5) while, consisting of half blood only, any *dis*-united co-heirs of the whole divide with them,—union in blood being, for this purpose, equivalent to reunion in coparcenary.(6) And the participation of the half blood at all in this case regards the real estate only; for, as to moveable effects, they at all events descend exclusively to the whole blood,

(1) Menu, IX. 210. Jim. Vah. ch. XII. 1.
Note on 3 Dig. 550. Vrihaspati, Id. 476. 552.

(2) Mit. on Inh. ch. II. ix. 4.—See also Yajnyawalcya, 3 Dig. 507. 476. Vasishta, Id. 477. Vachespati Misra, Id.

(3) Vachespati Misra, 3 Dig. 477.

(4) 3 Dig. 478.—See also Menu, IX. 212. *Vriddha* Menu, 3 Dig. 478. Vrihaspati, 3 Dig. 476. 458. Cullυca Bhatta, Id. 477.

(5) Mit. on Inh. ch. II. sect. ix. 6.

(6) Mit. on Inh. ch. II. sect. ix. 9.

reunited or not.(1) The share of one who has entered into the fourth order, or become otherwise disqualified, on re-partition, vests in his representatives;(2) and, in general, the rules prescribed for an original partition are applicable to the one in question.(3)

Partition of estates by the Athenian law has met with its advocate in the eminent translator of the speeches of Isæus;(4) and the last public act of the celebrated Mirabeau was the preparation of an argument, (of which death prevented the delivery by him in the National Assembly,) against the testamentary power, as a source of inequality and injustice in the transmission of property. The system of perpetual partition may be proper for democratic governments, like Athens of old, and modern America. It exists partially in England under the denomination of *gavelkind*, a remnant of the old Saxon law; but has long been wearing out, not being adapted to a constitution like ours, in which unequal fortunes, and hereditary wealth, are indispensable to the maintenance of that aristocracy, or intermediate class between the prince and the common people, which forms one of the essential orders of the state. For the same reason, it is unsuitable to France, as settled under its late and present Charter. It may be a good institution for despotic countries, such as India; by preventing that accumulation, which has a tendency to produce checks on the supreme power. Accordingly, the great Zemindaries of Bengal having been, by the custom

(1) Jim Vah. note to ch. XI. sect. v. 36.
(2) Mit. on Inh. ch. II. sect. ix. 15. 3 Dig. 476.
(3) Jim. Vah. ch. XII. 5. 3 Dig. 549, et seq.
(4) Commentary on Isæus, by Sir William Jones, p. 168.

of the country, or usage of particular families, descendible to the eldest, or other appointed son, in exclusion of the rest, it became the policy of Lord Cornwallis, when Governor-general, to adopt means for breaking them gradually down, by subjecting them, as deaths happened, to the law of partition.(1) It has been supposed indeed that, till our possession of them, *all* property was, in those provinces, among Hindus, so descendible; *i. e.* to the eldest son exclusively. Had it been so, the conclusion would be, that it had been rendered so by their Mahomedan conquerors, innovating upon their ancient institutions. Whatever opinion may be entertained of its policy, the course of inheritance, as it at present obtains, with this class of natives, throughout India, is consonant to their original law,(2) as it seems most agreeable to nature.

(1) Eleventh Bengal Regulation, 1793. Ante, p. 175.
(2) Menu, ch. VII. 203.

CHAP. IX.

EXCLUSION FROM INHERITANCE.

EXCLUSION from inheritance, with the Hindu, rests, in general, upon the same principle with succession to it; *i. e.* it is connected with the obsequies of the deceased; from their incapacity to perform which the excluded are incompetent as heirs. (1) The causes of it are sufficiently numerous; defects both of body and mind, together with vice, constructive as well as actual, being attended with this effect; and lastly, devotion to any of the religious orders.

At first sight, it appears harsh to divest of their heritable rights, not only idiots and madmen, but the deaf, the dumb, and the blind, the lame, and the impotent; (2) and, certainly, disqualification, in this respect, is extended, by the law in question, beyond what takes place in our own, or other codes; but when it is considered, how unfitted these in general are for the ordinary intercourse of the world, (3) and that they are, by the same law, anxiously secured in a maintenance for life, chargeable upon those who replace them as heirs, the severity of the enactment is not only in some degree abated, but it even

(1) Jim. Vah. XI. sect vi. 31.

(2) Menu, IX. 201, 202. Jim. Vah. ch. V. § 7, et seq.
Mit. on Inh. ch II. sect. x. Daya Crama Sangraha, ch. II.

(3) Baudhayana, 3 Dig. 316. 2 Dig. 2.

admits of comparison with our own institutions. The idiot and lunatic are not indeed, with us, disinherited; but, in effect, their condition, while their infirmity continues, differs but in name from that of the Hindu, alike destitute of reason. Their property is, by the English law, vested in others, subject to their being maintained out of it; which is precisely the condition of the Hindu, under similar circumstances; with this in his favour, that the obligation of maintenance, on behalf of the excluded in general, is rendered as cogent as possible; any failure in it being not only a cause of disherison in those, by whom it is withheld, but denounced moreover for punishment in another world; (1) thus, in the instance of persons, not only wretched and helpless, but, circumstanced as they are, peculiarly likely to be neglected, establishing it as a most sacred right. It is only where these infirmities are coeval with birth, that the disability attaches: though Jagannatha seems to make the case of the madman an exception in this particular; (2) and, of the impotent (who is also excluded) it is said by a sensible author, to be indifferent, whether he is naturally so, or by castration. (3) The idiot is described as one incapable of discriminating right from wrong, and insusceptible of instruction; (4) and various causes are assigned for that madness which disqualifies. (5) The deaf, the

(1) Menu, IX. 202. Mit. on Inh. ch. II. sect. x. § 5. 3 Dig. 320.
(2) 3 Dig. 314. Vid. tamen Id. 304
(3) Balambhatta, note to Mit. on Inh. ch. II. sect. x. § 1. Qu tam. et vid. 3 Dig. 320.
(4) Mit. on Inh. ch. II. sect. x. § 2 Jim. Vah. ch V. § 9.
(5) Mit. on Inh. ch II. sect. x. § 2.

dumb, and the blind are, with us, severally, as such, no way affected in their rights; but, if a man be born destitute at once of the power of hearing, speaking, and seeing, the avenues of knowledge thus shut up, and the requisites of a social being denied him, he is, by our law, looked upon as an idiot, and liable to be treated accordingly. And, upon the same principle, the ground of their exclusion by the Hindu law is stated by one writer to be their want of initiation and investiture, arising from their unaptness for the requisite studies. (1) By this law, privation of any one of these faculties excludes from inheritance, as does lameness; but it must be entire; that is, the individual must be so lame, as not to be able to walk on either foot; and so, as to his hands, he must be deprived of the use of both. (2) To induce disherison with us, from bodily defect, the birth must be a monstrous one; for, however deformed, or deficient, if it have human shape, it may be heir.

But neither are these, by the law under consideration, the only natural visitations productive of this civil disability. Believing, as we do, in the resurrection of the body, we remain ignorant as to the intermediate state of the soul after death, possessing in that particular no distinct revelation. But the Hindu conceives his attainment of supreme bliss, in the reunion of his spirit with its author, to be subject to innumerable transmigrations, according to circumstances, and especially according to his conduct in the present life; (3)—a notion, (whether originating

(1) Jim Vah. ch. V. § 18.
(2) 3 Dig. 321, 322. Jim. Vah. ch. V. § 10.
(3) Menu, ch. VI. 61 Id. ch. XII. 16, et seq

with the Hindu, or not,) that appears to have been widely adopted in ancient times.(1) Hence his tenderness to sentient beings of every description, and reluctance to the shedding of blood; with his habit, sanctioned by law, of attributing to delinquency, in a former state of existence, a great proportion of the physical infirmities to which flesh is heir. Universally, the sin of the parent but too often manifests itself in the debility of the offspring; and the individual, in various ways, feels in his frame the direct fruits of his own vicious indulgence. But, with the timid and superstitious Hindu, overlooking natural causes, maladies, if extreme, are regarded as an expression of the divine displeasure at vice and crime, indulged and perpetrated in a prior form; which it remains for the actual sufferer to expiate, forfeiting in the mean time his succession. "Some evil-minded persons, (says "Menu,) for sins committed in this life, and some for "bad actions in a preceding state, suffer a morbid change "in their bodies."(2) Reproduceable to the extent of seven successive births,(3) of these morbid and sinful marks, presumptive of crime, and obstructive of inheritance, a copious and minute list is added;(4) of which some of the specimens are sufficiently appropriate, with reference to the offence they are considered as repre-

(1) St. John, ch. IX. ver. 1.
Non interire animas, sed ab aliis, post mortem, transire ad alios. (Cæsar Comm. lib. vi. 14.) Whence Horace's description, *non paventis funera Galliæ.* Upon which the Scholiast says, *verâ persuasione rursus renascendi mortem non timebant.* And, to the same persuasion may perhaps be referred that passive courage, so characteristic of the Hindus.

(2) Menu, XI. 48. Append. p. 333.

(3) Satatapa, 3 Dig. 313.

(4) Menu, XI. 49, et seq.

senting. The disease that disables, (an obstinate, or an agonizing one,) must be ascertained to be the sign of an atrocious crime, or it has not the effect of excluding; (1) it being, not the disease, but the sin that is the cause of the disability; (2) and hence it may be removed by penance, (3) the impediment continuing to operate, only so long as penance remains unperformed. (4) Thus restored, inheritability follows; there being said to be no case, in which a man competent to the one, is not qualified for the other. (5) Of *obstinate* diseases, *marasmus*, or atrophy, is mentioned as an instance; of the *agonizing*, leprosy; but it must be of the sanious, or ulcerous (the worst) kind; (6) of which a text of the *Bhawisha Purana* gives a disgusting description. (7)

If vice, thus imputed by inference, of which the individual is unconscious, is to be so punished, and requires to be so expiated, much more that of which, in his actual person, the guilt of the delinquent is established, by confession, or proof. "All those brothers (says Menu) "who are addicted to any vice, lose their title to the in-"heritance." (8) And, though free from vice, if, destitute of

(1) 3 Dig. 314.
(2) 3 Dig. 312.
(3) Menu, XI. 209, et seq.
(4) Append. p. 340.—E.—Id. 344.—C.
(5) 3 Dig. 305.
(6) 3 Dig. 303. 309. 311, 312.—Mit. on Inh. ch. II. sect. 1.
See case of leprosy, as justifying suicide, with its aiders and abettors; Beng. Rep. 1810. p. 239, and 321.
(7) 3 Dig. 309.
(8) Menu IX. 214.—Jim. Vah. ch. V. § 13. 3 Dig. 299. 302, et seq. Daya Crama Sangraha, ch. III. 2, et seq.

virtue, a son neglect fulfilling, to the utmost of his power, prescribed duties, he is excluded from participation. Passing by positions so general, and which have not been uniformly expounded, certainty will be best sought in particular instances. By some, vice, excluding from inheritance, is resolved into the unwarrantable pursuit of wealth by robbery, larceny, crimes against the person, with inferior delinquencies.(1) Of these, such as amount to felonies, are attended with forfeiture by our own law. Whether this explanation of the term comprehends *gaming*, must be collected from various authorities,(2) compared as to weight and number. The Digest, reviewing different opinions on the point, says, that many authors (among whom is included Culluca Bhatta) acknowledge the exclusion of a man addicted to it, and similar vices;(3) while others are alluded to, according to whom, the persons in question are not deprived of their shares: but, whether by this, or by whatever other means they *dissipate* that wealth, in which not themselves alone have an interest, they lose of their inheritance *pro tanto;* it becomes matter of account; and their allotment, on partition, is diminished, by so much as they have squandered or wasted, the difference, if against them, constituting a debt;(4) leaving it to the pursuit of courses more distinctly criminal to work at once an entire forfeiture.(5) Though our own

(1) Jim. Vah. ch. v. 13. Mit. on Inh. ch. II. sect. x. 3. Vrihaspati, 3 Dig. 230. 301. Nareda, Id. 303.
(2) Nareda, 3 Dig 140. Apastamba, 3 Dig. 298.
(3) 3 Dig. 300. Daya Crama Sangraha, ch. III. 6.
(4) 3 Dig. 299, contr.—Ante, p. 200.
(5) 3 Dig. 298. 300

have not adopted the construction of the Roman law, which regarded and treated the notorious prodigal as *non compos*, nor the policy of Solon, which branded him with perpetual infamy, it may be recollected that dissipation of his feud was, by the law of feuds, a cause of forfeiture. *Si vassallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur.*(1) And it must be admitted that, among a people with whom a community of interests is the most common form of property, it is expedient that some security, likely to be efficient, should exist, to protect families against the consequences, in any of their members, of vicious extravagance. In assigning the punishment for gaming, Menu is silent as to its excluding from inheritance.(2)—It must be confessed that, with every benefit of distinction and explanation, for want of well-defined cases, judicially ascertained, and authentically reported, much, in enforcing the greater part of the law comprehended in the whole of this chapter, must be left to the delicate discretion of the Judge. In the mean time, the following recapitulation and remarks will be received with the respect due to the authority from whence they proceed. "In "regard to the causes of disinheritance, discussed in the "Digest, b. v. ch. 5. sect. 1., corresponding with the 5th "ch. of Jimuta Vahana, and the 10th sect. ch. 2. of the "Mitacshara, I am not aware, that any can be said to have "been abrogated, or to be obsolete. At the same time, I "do not think any of our Courts would go into proof of one "of the brethren being addicted to vice, or profusion, or of

(1) Wright, on Tenures, p. 44, citing Zasius, in Usus Feud. 91. and Crag. de Jur. Feud. 362.

(2) Menu, ch. IX. 221 to 228.

" being guilty of neglect of obsequies, and duty toward an-
" cestors. But expulsion from caste, leprosy, and similar
" diseases, natural deformity from birth, neutral sex, unlaw-
" ful birth, resulting from an uncanonical marriage, would
" doubtlessly now exclude; and, I apprehend, it would be to
" be so adjuged in our Adawluts. That the causes of disin-
" heritance, most foreign to our ideas, are still operative,
" according to the notions of their law among the natives,
" I conclude from some cases that came before me, when I
" presided in Zilla Courts. I will mention but one, which
" occurred at Benares, at the suit of a nephew against his
" uncle, to exclude him from inherited property, on the
" ground of his having neglected his grandmother's obse-
" quies. He defended himself, by pleading a pilgrimage
" to *Gaya*, where he alleged he had performed them.
" His plea, joined with assurances of his attending to his
" filial duty in this respect in future, was admitted; and
" the claim to disinherit him, disallowed."(1) It remains to consider one case, that may be said to be, with reference to personal delinquency, *instar omnium*—occurring in every enumeration on the subject, as a cause of exclusion,—namely, *degradation*, or the case of the *outcaste*.(2) Accompanied with certain ceremonies, its effect is, to exclude him from all social intercourse, to suspend in him every civil function, to disqualify him for all the offices, and all the charities of life;—he is to be deserted

(1) Per Mr. Colebrooke, in MSS. penes me.

(2) Menu, IX. 201. Jim. Vah. ch. V. § 3.
Mit. on Inh. ch. II. sect. x. § 1, 2.
Sancha and Lichita, 3 Dig. 300. Nareda, Id. 303.
Devala, Id. 304. Brahma Purana, Id. 312, 313.
Vishnu, Id. 316. Baudhayana, Id. 316.

by his connexions, who are, from the moment of the sentence attaching upon him, to "desist from speaking to "him, from sitting in his company, from delivering to "him any inherited, or other property, and from every "civil or usual attention, as inviting him on the first day "of the year, or the like."(1)—So that a man, under these circumstances, might as well be dead; which, indeed, the Hindu law considers him to be, directing libations to be offered to *Manes*, as though he were naturally so.(2) This system of privations, mortifying as it must be, was enforced under the ancient law, by denouncing a similar fate to any one, by whose means they were endeavoured to be eluded;(3) but this severity was moderated at the beginning of the present age, in which it is said "the "sinner alone bears his guilt;"(4) the law deeming so seriously of non-intercourse, that if one who ought to associate at meals with another, refuses to do so, without sufficient cause, he is punishable.(5) The analogy between degradation by the Hindu law, and excommunication, as it prevailed formerly among us, holds, not merely in the general nature and effect of the proceeding, but in the peculiar circumstance of the one and the other being twofold. As, with us, there was the less, and the greater excommunication, so, of offences considered with reference to their occasioning exclusion from inheritance among the Hindus, they may also be regarded in a two

(1) Menu, ch. XI. p. 185. Id. IX. 238. Append. p. 522.—C.
(2) Menu, ch. XI. 183, 184. Append. p. 335.
(3) Menu, ch. XI. 181, 182.
(4) Parasara, General Note, at the end of Menu, p. 363.
(5) Append. p. 337.—C.

fold point of view. This we learn from a case that was before the Sudder Dewanny Adawlut in 1814, in which the official Pandits, having been referred to, distinguished between "those which involve partial, and temporary de- "gradation; and those which are followed by loss of "caste;"—observing that "in the former state, that of par- "tial degradation, when the offence which occasions it is "expiated, the impediment to succession is removed; but "in the latter, where the degradation is complete, al- "though the sinfulness of the offence may be removed by "expiatory penance, yet the impediment to succession still "remains; because a person finally excluded from his "tribe must ever continue to be an outcaste."(1) In the case alluded to, the party in question having been guilty of a series of profligate and abandoned conduct, having "been shamefully addicted to spirituous liquors; having "been in the habit of associating and eating with persons "of the lowest description, and most infamous character; "having wantonly attacked and wounded several people "at different times; having openly cohabited with a "woman of the Mahomedan persuasion; and having set "fire to the dwelling-house of his adoptive mother, "whom he had more than once attempted to destroy by "other means," the Pandits declared, that "of all the of- "fences proved to have been committed by *Sheanauth*, "one only, namely, that of cohabiting with a Mahomedan "woman, was of such a nature, as to subject him to the "penalty of expulsion from his tribe *irrevocably*;"—and

(1) Sheanauth Rai *v.* Mussummaut Dayamyee; Beng. Rep. 1814. p. 434. 1 Dig. 279. 288.

of this opinion was the Court. The power to degrade is, in the first instance, with the *caste* themselves, assembled for the purpose; from whose sentence, if not acquiesced in, there lay an appeal to the King's Courts.(1) In the case that has been cited, the question arose incidentally, upon a claim of inheritance; and that case shews that the power amounts to a species of *censorship*, applicable to the morals of the people, in instances to which the law, strictly speaking, would not perhaps otherwise extend. The sentence can be inflicted only for offences committed by the delinquent in his existing state;(2) and, where the offence is of an inferior nature, to justify it, it must have been repeated.(3) What distinguishes degradation from other causes of exclusion is, that it extends its effects to the son, who is involved in his father's forfeiture, if born subsequent to the act occasioning it.(4) Born before, he is entitled to inherit, and takes, as though his father were dead. (5) Whereas, in every other instance of exclusion, the son, if not actually in the same predicament with his father, succeeds, maintaining him; the same right extending as far as the great-grandson.(6) And, with regard to the father, or delinquent himself, where the exclusion from inheriting is not for natural defects, the cause must have arisen, previous to the division, or descent of the

(1) Append. p. 339.—E.
(2) 3 Dig. 312.
(3) 3 Dig. 304.
(4) Devala, 3 Dig. 304.—Vishnu, Id. 316.
Daya Crama Sangraha, ch. III. vii. 152.
(5) 3 Dig. 321.
(6) Jim. Vah. ch. V. § 19.—Mit. on Inh. ch. II. sect. x. § 3.
3 Dig. 304. 324.—Daya Crama Sangraha, ch. III. vii. 13.

property; if it do not occur till after, the succession is not divested by it.(1) Hence, adultery in the wife, during coverture, bars her right of inheritance;(2) but, if it have once vested in her, it does not appear that she holds it, like our widows, in most instances of copyhold dower, *dum casta fuerit* only; though, according to an opinion of great respectability, for loss of caste, unexpiated by penance, and unredeemed by atonement, it is forfeited.(3) In general, the law of disqualification applies alike to both sexes.(4)

It appearing, then, that the incapacity to inherit, except in the instance of the *outcaste*, is personal merely; that one excluded may be said, in every case, to be entitled to be maintained;(5) and that, in most, it is in his power, at any time, to restore himself to his rights;—whatever may be thought of the wisdom of some of these provisions, it cannot be said that they are universally destitute of justice, or, in any instance, totally devoid of humanity. Nor, in comparing this part of the law with our own, ought we to forget, that the latter has made none, for preventing the absolute disinheriting of children by will.

It has before appeared,(6) that, on entry into either of the two religious orders, the *devotee* (like the professed

(1) Mit. on Inh. ch. II. sect. x. 6. note. 3 Dig. 479.
(2) Mit. on Inh. ch. II. sect. i. 30. 39.
Vrihaspati, 4. 3 Dig. 458. *Vriddha* Menu, Id. 478.
Beng. Rep. ante 1805. p. 64. Append. p. 420.—S. Id. 422.—C.
(3) Append. p. 344.—C. See also 3 Dig. 479.
(4) Mit. on Inh. II. sect. x. 8.
(5) Post, ch. X. p. 234.
(6) Ante, ch. V. p. 114.

monk with us before the Reformation) becomes *civiliter mortuus;* and the next heir succeeds, as though he were naturally deceased.(1) And, as the *devotee* himself, abdicating secular concerns, is incapacitated from inheriting, so is, very properly, the religious *pretender*, and the eventual *apostate.* Under the former term may be included *hypocrites* and *impostors*, used synonymously for those who, usurping sacred marks, practise austerities with an interested design.(2)

The remaining cause of exclusion to be noticed is, an *incompetent marriage;* that is, where the husband and wife are descended from the same *stock.* Such a marriage being incongruous, the issue of it cannot inherit, excepting among Sudras. And the consequence is the same, where the marriage has not been according to the order of *class.*(3)

The heir, or heirs, under no disability, having succeeded to the inheritance, it is next to be seen, to what *charges* this is liable.

(1) Menu, ch. IX. 211, 212.
Vasishta, Mit. on Inh. ch. II. sect. x. § 3.
3 Dig. 3. 7.—Catyayana, Id. 326.

(2) Devala, 3 Dig. 304. 315.
Menu, ch. IV. 200. 211. Id. ch. VII. 154.
Jim. Vah. ch. V. 14.—3 Dig. 327.

(3) Ante, p. 220.

CHAP. X.

CHARGES ON THE INHERITANCE.

THE charges, to which the inheritance is liable, are of three kinds. First, debts, and other obligations, in the nature of legacies. Secondly, certain specific duties to be provided for out of it, where it has descended to a single heir, and out of the common fund, where it has vested by survivorship, in undivided parceners. Thirdly, maintenance, of all requiring, and entitled to it.

1. The first charge to be noticed is the payment of debts; an obligation which the Hindu law inculcates upon the heir, as of importance to the peace of the deceased, equally with the performance of his funeral ceremonies;—the two together constituting the true consideration for inheritance. The most general position respecting it is, that debts follow the assets into whosesoever hands they come;(1) the obligation to pay attaching, not upon the death only of the ancestor, but on his becoming an anchoret, or having been so long absent from home, as to let in a presumption of death.(2) But, to be thus binding, a debt must have been incurred on a good consideration. This excludes such as have arisen from gaming, or the purchase of spirituous liquors; except

(1) Yajnyawalcya, 1 Dig. 270. and many subsequent pages.
(2) Vishnu, 1 Dig. 266. 268. 278. 280.

in privileged times, when excesses may be indulged.(1) Debts due for tolls and fines are also excepted;(2) the reason of which may be, that they are to be regarded as ready money payments, for which credit will have been given, at the risk of him by whom they ought to have been received. And, where the consideration of a debt may have been such, as in its nature to charge the common fund, as for the nuptials of any of the family, the expense attending them must have been reasonable, according to the usage and means of the family; beyond which, if carried to excess, he, who so imprudently contracted it will be alone liable, unless it have been adopted by the rest.(3) Contracted fairly, for the use of the family, by whatsoever member of it not forbidden, it binds the whole.(4) Much as is said every where of the religious tie the son is under, to pay the debts of his ancestor, it seems settled at Bengal, that it has no legal force, independent of assets.(5) But, to the Southward, the doctrine of the Mitacshara, supported by the Madhavya, and Chandrica, is said to render the payment of the father's debts with interest, and the grandfather's without interest, independent of assets, a legal, as well as sacred obligation.(6)—A priority also is prescribed, in the payment of debts, suitable, in one respect, to the genius of

(1) Menu, ch. VIII. 159. 1 Dig. 296. 307.
Vrihaspati, 1 Dig. 304. 305. 311. Append. p. 444.
(2) 1 Dig. 304. 307. 309.
(3) 1 Dig. 294, 295.
(4) Menu, ch. VII. 166. 1 Dig. 282, et seq. and 290.
(5) 1 Dig. 320. Note to Id. 266.
(6) 1 Dig. 270.—Append. from p. 346. to p. 354.

the law: depending, first, on *class;* next, upon the *time* when they have been severally contracted. Where creditors are of different classes, the Brahmin is to be preferred in payment; and others, according to the order of their class; —while, among creditors of the same class, the payment is to be in the order, in which the respective debts due to them were contracted. But, as there is no fraction of a day, where debts due have been contracted on the same day, the payment is to be *pari passu*, by a proportionate distribution of the assets; excluding altogether the creditor who, possessing a pledge, has trusted to it for his recovery. (1) To these rules, there is an exception in favour of a creditor, whoever he may be, and whensoever the debt due to him was contracted, with reference to assets produced by his particular loan; upon which he has a sort of *lien*, being entitled to be paid out of them in the first instance; and in preference to any other claimant. (2) The course for the payment of debts, on partition, may be either by disposing of a sufficient part of the property for the purpose, and thus paying them off at once; or, by apportioning them among the parceners, according to their respective shares;—an arrangement which, to be binding upon creditors, would require their assent. (3) Modified as the details of Hindu law are everywhere by local usage and practice, how far the whole of the ancient provisions for the payment of debts are at present applicable, must be left to the discretion of Courts, exercising juris-

(1) 1 Dig. 376 to 379.
(2) Catyayana, 1 Dig. 380.
(3) Jim. Vah. ch. 1 48 Append. p. 355.—C.

diction, within particular limits. What remains to be adduced on the subject will be more properly reserved for the chapter on Contracts.

Connected with the above duty, is the discharge of obligations, resting on the intention of the deceased, sufficiently manifested; since, though nothing occurs in the Hindu law expressly in favour of the testamentary power, as exercised under other codes, it provides distinctly for the performance of promises by the ancestor in his lifetime, to take effect after his death; and, to this extent, a "*friendly gift*," as it is called, not being an *idle* one, and far less, one founded on an *immoral* consideration, being available in law as a charge upon heirs, may be assimilated to a legacy.(1) But, according to the doctrine of the Mitacshara, such a gift, referring to property held in common, in order to be good, must have had the consent of the deceased's coparceners.(2) It differs also from a legacy in this, that it does not, like it, lapse by the death of the donee in the lifetime of the donor, but descends, according to the general law of inheritance, as low as his great-grandson, or fourth in descent; and, in the event of absence in a foreign country, to the seventh.(3) This peculiarity also attends it, that, if once vested in the donee, it is partible among his co-heirs, if he have any;—if, never vesting in him, in consequence of his death during the life of the donor, it descends to his heir, the latter takes

(1) Menu, ch. VIII. 159. Jim. Vah. ch. I. § 47.
Catyayana, 1 Dig. 299. 2 Id. 96. 3 Id. 389.
1 Dig. 247. 303 to 305.

(2) Mit. on Inh. ch. I. sect. 1. § 30.

(3) Append. p. 133.—S. contra.

it, not liable to be shared.(1) And, as with us, necessary funeral expenses are allowed the executor, previous to all other debts and charges, to this place may be referred the duty enjoined by Vrihaspati to the Hindu heir, of setting apart a portion of the inheritance, to defray, on behalf of the deceased, his monthly, six monthly, and annual obsequies;—on the ground of wealth being intended for spiritual benefit, as well as for temporal enjoyment.(2)

2. Not less obligatory upon the heirs is the charge for the *initiation* of the uninitiated, and the *marriage* of the unmarried members of the family. Initiation involves a succession of religious rites, attended with more or less of expense; commencing with purification, and terminating in marriage. They are ten in number; of which marriage is the only one competent to females and Sudras; the rest being confined to males, of the three superior classes.(3) The duty of initiating attaches to those who have themselves been initiated; and the provision for it is to be made before partition, out of the common stock.(4) It has been already intimated,(5) that charges of this nature, to be available against the inheritance, must be reasonable; though this is seldom attended to.—They regard brothers and sisters only, not extending to collaterals.(6)

(1) 3 Dig. 389.
(2) Jim. Vah. ch. XI. sect. vi. 13. Vrihaspati, 3 Dig. 532.
(3) Note to Mit. on Inh. ch. I. sect. vii. 3.
Note to Datt. Mim. sect. iv. 23. Note to 3 Dig. 104. Id. 94.
Vrihaspati, 3 Dig. 101.
(4) Mit. on Inh. ch. I. sect. vii. 3. 4. 3 Dig. 96. 98. 102.
(5) Ante, p. 227.
(6) Append. p. 359.—C.

3. The general claims of the dependant members of the family come lastly to be considered; of which the first to be noticed is that of the *widow*, where she does not take as heir, to *maintenance*. In awarding it to her, what she possesses as *Stridhana*, or her peculiar property, is to be taken into account; the utmost that she can claim being, to have it made up to her, equal to what would be a son's share, in the event of partition.(1)

The right of the widow to maintenance, where she does not take as heir, and where any *peculiar property* that she possesses is not sufficient for the purpose, being established, it remains to be seen, in what this charge on the inheritance consists, and how it is to be provided for.(2) It may be supplied by an assignment of land, or an allowance of money; in either case proportioned to her support, and that of those dependant upon her, including the performance of charities, and the discharge of religious obligations; and this always, with a reference to the amount of the property, so as, at the utmost, (as has been said,) not to exceed a son's, or other parcener's share. In whatever way the provision is made, care should be taken to have it secured. The manner of doing this is discretionary, there being no special law, directing how provision is to be made. Whether, in estimating her *Stridhana* on the occasion, her clothes, ornaments, and the like, are to be taken into account, or only such articles of her property as are productive of income to her, or conducive to her subsistence, does not distinctly appear; though the restricting

(1) Ante. p. 117 Append. p 362 to 370.
(2) Append. p. 371 to 381.

the account to the latter would seem to be reasonable, considering the object.(1) An opinion, that her maintenance should be independant of her peculiar property, is unsupported.(2) As chastity is a condition of her inheriting, on failure of male issue,(3) so, it would seem that, by a want of it, she forfeits her right to maintenance;(4) as, under similar circumstances, does the wife her *alimony*, by the ecclesiastical law of England; leaving it a question, however, in the case of the Hindu, whether, notwithstanding, she be not entitled, (as *outcastes* generally are,) to food and raiment.(5) Where her husband's property proves deficient, the duty of providing for her is cast upon his relations; and, failing them, upon her own; an obligation that attaches, though she should have wasted what was assigned to her for the purpose; giving colour to the law, requiring her to live with them, that they may watch and control her conduct.(6) The *grandmother* also, forming a part of the family, is alike entitled to maintenance.;(6) as are also the stepmothers.(7) *Married sisters* are considered as provided for.(8) *Unmarried* ones, maintainable out of the family property till marriage, are, upon

(1) Append. p. 377.—E.

(2) Append. p. 379.—E.

(3) Ante, ch VII p. 157. Post, ch. xi. p. 242.

(4) Append. p. 344. 382. It has been suggested, that the consequence of unchastity by a Hindu female attaches only where it is of a special nature; as by the wife or widow of a preceptor with his pupil, or with a man of an inferior caste.—But, quere, What authority there is for so restricting it?

(5) Mit. on Inh. ch II. sect. 1 7. 57. Id. sect x. 14, 15.
Jim. Vah. ch. V. 19. 3 Dig. 324. 479.
Post, ch XI p. 245.

(6) 3 Dig. 12. 27. 30. 90

(7) Daya Crama Sangraha, ch. VII 3.—But see Id 7, 8.

(8) Append p. 383.—C.

partition, a charge upon it, to the extent, as is commonly said, of a quarter of a share;(1) an allotment explained by various authorities, including the Chandrica and Madhavya, as meaning a sufficiency only for the expenses of their marriage; and *widowed* ones, not otherwise provided for, are entitled to be maintained.(2) The difficulty attending the apportionment to a sister, of an aliquot part of a brother's share, is removed, by shewing, that the allotment intended is not a fourth to each sister, to be deducted from the share of each brother, (which, according to the state of particular families would, it is admitted, render the partition, as between brothers and sisters, quite disproportionate,) but a participation, out of the whole, equivalent to the fourth of a brother's share, without regard to the number of brothers.(3) Where the widow succeeds as heir, she takes, subject among other things, to defray the education and nuptials of an unmarried daughter;(4)—as also to maintain those whom the deceased was bound to support.

But neither are these all the charges to which the inheritance is subject, before it is distributed. It has been seen that, in the Sudra class, *illegitimate* sons succeed as heirs, wholly, or partially, according to the state of the family in that respect;(5) and, in all the classes, as with

(1) Mit. on Inh. ch. I. sect. vii. 5, 6.
Jim. Vah. note to ch. XI. sect. i. 20.
Menu, ch. IX. 118. 3 Dig. 90, et seq.
Append. p. 383. 385.—C.

(2) 3 Dig. 92, et seq.

(3) Mit. on Inh. ch. I. sect. vii. 5, et seq.

(4) Jim. Vah. ch. XI. sect. i. § 63. 66.
3 Dig. 489. 1 Id. p. 321. 3 Id. 461.

(5) Ante, p. 101. 153.

us, it is the duty of the parent to maintain issue of this description; an obligation that attaches to the survivors, and is to be provided for upon partition.(1) The mothers of such children also have the like claim, which the providence of the law, not content with securing for them, in all ordinary cases, has been careful to charge upon heirless property, in the hands of the king.(2) The claim of another class of dependants remains to be noticed,—namely, that numerous one, the subject of the preceding chapter, excluded, some by their destiny, others by various disabilities, from inheritance; but all, by the humane provision of the law, entitled, out of it, to an abundant maintenance;(3)—all, unless the *outcaste*, and his issue subsequently born, are to be excepted.(4) According to Menu, the substituted heir is to provide it for life, without stint, to the best of his power, subject to penalties and consequences, that have been already stated.(5) With regard to the *outcaste*, and his issue, authorities differ;(6)—upon which it is observable, however, that he is not excepted by Menu, and that he is admitted by Yajnyawalcya. It is true, the measure is restricted to "food and raiment;"(7)—to which, if the *outcaste* be admissible, it would seem difficult to exclude the adulterous

(1) Mit. on Inh. ch. I. sect. xii. § 3.
Ante, p. 103.
(2) Mit. on Inh. ch. II. sect. i. § 7. 28. Jim. Vah. ch. XI. sect. i. § 48. 52.
(3) Menu, ch. IX. 202. 3 Dig. 318.
(4) Jim. Vah. ch. V. 11.
(5) Ante, p. 100. Menu, ch. IX. 202.
(6) Menu, ch. IX. 202. Mit. on Inh. ch. II. sect. x. 1.
Jim. Vah., citing Devala, and Baudhayana, ch. V. 11, 12.
(7) Mit. on Inh. ch. II. sect. x. 5.

widow. Of persons disqualified to inherit, their childless wives, continuing chaste, are moreover to be provided for; as are also the maintenance and nuptials of their unmarried daughters. So anxiously careful has the Hindu law been, that there shall exist no final distress in families, while means exist to prevent it, even in instances of the most undeserving!

CHAP. XI.

ON WIDOWHOOD.

It has been seen, in a former chapter,(1) that the wife surviving her husband, succeeds as heir to him, in default of male issue. It remains to be shewn in the present, how the widow's property descends, whether inherited from her husband, or otherwise derived, premising some account of the state of widowhood among the Hindus;—a condition too peculiar, not to demand a distinct and separate consideration. The entire subject will be comprehended under the two following heads: viz. I. What regards her *person*. II. What regards her *property*.

I. In considering the law as it regards her person, three things in particular offer themselves to our attention. 1. Her obligation to *burn*. 2. The restriction she is under with respect to a *second marriage*. 3. Her *dependance*, in other respects.

1. The first thing that occurs, in contemplating the state of widowhood among the people in question, is, its horrid termination, almost the moment it commences, in instances, in which religious enthusiasm has been made to operate on the hopes and fears of the deluded victims;—to *burn* with her deceased husband, being inculcated upon the Hindu widow, not out of respect to his memory

(1) Ch. VI.

merely, but as the means of his redemption, from the unhappy state into which he is believed to have passed; (1) and, as ensuring, in consequence, to herself, (not everlasting indeed, but) long-continued felicity. Ascending his pile, and casting herself with him into the same flame, she is said "to draw her lord from a region of torment, "as a serpent-catcher draws a snake from his hole." *Her* virtue expiates whatever crimes *he* had committed, even to the "slaying a Brahmin, returning evil for good, "or killing his friend." And, for this proof of it, a kind of Mahomedan paradise is promised her. They mount together to the higher regions; and there, *with the best of husbands*, lauded by choirs of *Apsaras*, she sports with him as long as fourteen *Indras* reign;—or, according to another medium of computation, for so many years as there are hairs on the human body. (2)—It is not, however, a practice, to which the Hindus are in general enthusiastically attached; or about which, as to its propriety, they are universally agreed. That it has, under certain restrictions and regulations, the sanction of the Shaster, admits of no dispute; upon which ground any attempt to

(1) Angiras, 2 Dig. 451. Vyasa, Id. 454.
Asiatic Res. vol. iv. p. 209, 8vo. edit. Ante, ch. III. p. 61.

(2) Angiras, 2 Dig. 451.

Nec minus uxores famâ celebrantur Eoæ.
Non illæ lacrymis,—non fœmineo ululatu
Fata virûm plorant; verum (miserabile dictu)
Conscenduntque rogum, flammâque vorantur eâdem!
Nimirum credunt veterum sic posse maritûm
Ire ipsas comites, tœdamque novare sub umbris.

DE ANIM. IMMORTAL. l. 177.

Conjugis, Evadne, miseros elata per ignes,
Occidit;—Argivæ fama pudicitiæ.

PROPERT. l. i. El. 15.

See also Euripid. Suppl. Act. v.

suppress it has been reprobated.(1) In one particular tribe, (*Jogee*, or caste of weavers,) the widow, in the Bengal provinces, *buries* alive with her deceased husband; but, according to the course generally observed in India in disposing of the dead, the common mode of self-immolation is, by burning with him on the same pile. Subject to slight varieties in different castes, and different parts of the country, in every instance of it one thing is clear; that, to be legal, the sacrifice on the part of the victim must be voluntary. It follows that it can be performed only by an adult, in possession of her faculties, and free: not stupified for the purpose by drugs; not influenced by designing priests, or interested relations; still less impelled by violence. Of the latter, occurrences are but too frequent, where, from her inability to sustain the fiery trial, the unhappy devotee, relenting in the course of it, is prevented from escaping, by the act of her relations, or others present; who, to obviate the disgrace of failure, to say nothing of less justifiable motives, will sometimes, with bamboos, push her into the hottest part of the fire, keeping her there by force till life be extinct; a conduct amenable to prosecution, but of which no instance appears, otherwise than as for a misdemeanor; though it goes nigh to realize the martyrdom of St. Lawrence! The burning must be with the privity of the ruling power, for the sake of preventing its taking place where it may be inadmissible, or under circumstances rendering it so. In order to which, where they have timely notice of what is

(1) See Col. Wilks's Sketches, vol. I. p. 499.

about to take place, it is customary for the police officers to attend, and see that what may be in itself lawful, is legally performed; *omnia rité esse acta.* Accordingly, to no woman is it permitted to burn, being pregnant at the time;—a condition, in a female, that has the effect with us, of suspending execution in a capital case;—nor, if she have children, or a child, not exceeding three years of age, unless some one will undertake to provide for it, or them, a suitable maintenance. This must be by engagement in writing, on the part of the nearest relation of the deceased. In the three inferior castes, the practice exists of cremation at a time subsequent, more or less, to that of the burning of the body of the husband, where he has died at a distance from the wife. It is called *Anoomurun*, in contradistinction to *Suhumurun*, importing to burn with it. But, to render *Anoomurun* legal, there should have existed some sufficient reason, why simultaneous burning could not take place; and the burning subsequent must follow, if at all, immediately upon the first notice of the death; the widow also being at the time in possession of something belonging to the deceased, to be burned with her, as of his turban, or sandal, which are the most usual symbols; though, according to circumstances, it may be his stick, his dagger, or his helmet: and, in an instance that occurred a few years ago, among the Mahrattas, some of the bones of the deceased were sent to his widow for the purpose. But, to a Brahmin widow, *Anoomurun* is altogether incompetent: she can burn only on the same pile with her husband; so that, in the instance just alluded to, which was that of a Brahmin, the act was considered as having been illegal, unless to be

justified by local custom, in opposition to the Shaster; and this notwithstanding that a part of the body of the deceased had entered into the ceremony.(1) By the Hindu law, as well as by ours, suicide is a crime; but the contrary is declared in this instance,—the motive sanctifying the act. (2)

2. To this tyrannic instance of marital selfishness must be added the prohibition to women of *second marriages;* and that this should apply, as it does, even to *virgin* widows,(3) is an abomination, surpassed only, if at all, by the custom that has just been denounced. The husband having kindled sacred fires, (*into which he is not expected to enter,*) and having performed funeral rites to his wife, *whom he has survived,* "may again marry, and again light "the nuptial flame."(4) Nay, so incumbent upon him is it to do so, with a view to his resuming the order of a *Housekeeper,*(5) *(Grihasta,)* that he is not to delay it a single instant.(6) But a widow who, though childless, slights her deceased husband by *marrying again,* not only brings disgrace on herself here below, but, according to the belief inculcated, is to be excluded from participating with him in another world;(7) a *second husband* being declared to be a thing not allowed to a virtuous woman, in any part of the Hindu code;(8) by which, when her lord is

(1) Brahma Purana, 2 Dig. 455. V. N. Purana, 2 Dig. 456. Vyasa, Id. 458. Asiat. Reg. vol. iv. p. 12.

(2) Brahma Purana, 2 Dig. 455

(3) General note at the end of translation of Menu, p. 364. Asiat. Res. vol. vii. p. 310.

(4) Menu, ch. V. 168.

(5) Ante, p. 36.

(6) 3 Dig. 106.

(7) Menu, ch. V. 161.

(8) Menu, ch. V. 162.—IX. 65. See also Id. 175, 176.

deceased, she is directed "not even to pronounce the "name of another man."(1) That the prohibition is as old at least as Menu, appears from the references to his Institutes; though, from its being included in the enumeration of things forbidden to be done in the present age,(2) a time is implied when it did not exist. That second marriages, by women, are practised in some of the *lower castes*(3) is, according to Hindu prejudices, no argument in their favour; these castes being, in many instances, not within the contemplation of the law. In the territories lately conquered from the *Peishwa*, a tax was found established on the *marriage of widows*, but the description given by the report,(4) in which they are noticed, rather confirms the restriction; at the same time that the practice implied gives colour to an account, of its having been determined, some years ago, by an assembly of Brahmins at Poona, in the case of a young woman, (of family,) who had lost her husband, before she had been admitted to his bed, that she need not *burn*, but might *re-marry*.(5) Here might be discussed the course that once subsisted, permitting the widow of a childless husband, or the wife of an impotent one, to raise up issue to him, by the intervention of his brother, or other kinsman, or even of a stranger, authorized for the purpose. The husband gave the authority; and, he being dead, the act was legal, if sanc-

(1) Menu, ch. V. 157.

(2) General note, at the end of translation of Menu, p. 364.

(3) 3 Dig. 149. Append. p. 532. 534.

(4) The Honourable Mountstuart Elphinstone's Report, p. 37, 38. and Append. to same, p. 7.

(5) Asiat. Journ. for July, 1822. p. 8.

tioned by his friends, or other guardians of the widow.(1) But it belongs also to the subject of *adoption*, in the Appendix to the chapter upon which, it will be found noticed, at sufficient length, considering that it is obsolete, and that, even while it prevailed, it was reprobated, and confined accordingly to the servile class.(2)

3. Not only is a Hindu widow restricted from marrying again, but *continence* is exacted of her, at the peril of forfeiting her exclusive property, as well as her right to maintenance; as, in the event of her husband dying, under circumstances to entitle her to succeed as heir, a want of it, while he lived, bars her claim, if a failure in it subsequent, unexpiated, do not deprive her of the inheritance, after it have vested.(3)—Accordingly, it is required of her to reside, after his death, with the son, or sons of her husband, if he have left any;—and, if not, with his other relations,(4) among whom *guardians* are to be selected for her,(5) the right of appointment resting ultimately, as in the case of minors, with the king;(6)—the policy of the Hindu law, with regard to the sex, being, that it is never, at any period of their lives, or under any circumstance, to be independant.(7) "Day and night (says "Menu,) must women be held by their protectors in a "state of dependance. Their fathers protect them in

(1) Vrihaspati, 2 Dig. 475. 1 Id. 325.
General note to translation of Menu, v. 3.
(2) Append. to ch. III. p. 175.
(3) 3 Dig. 479. Ante, p. 232. Append. p. 344. 382.—C.
(4) Jim. Vah. ch. XI. sect. i. 56, 57.
(5) Jim. Vah. ch. XI. sect. i. 64.
(6) Ante, ch. IV. p. 103. Menu, ch. VIII. 28.
Append. p. 381.—C. and 344.—C.
(7) Yajnyawalcya, 2 Dig. 381. Anon. Id. Nareda, 2 Dig. 384.

" childhood; their husbands protect them in youth; their " sons protect them in age. A woman is never fit for in- " dependance."(1) And a preceding text, in which the same condition is inculcated, establishes her dependance, if she have no sons, " on the near kinsmen of her husband; " if he left none, on those of her father; and, having no " paternal kinsmen, on the sovereign;" concluding, as already stated, that "a woman must never seek in- " dependance;" and carrying the principle the length of declaring, that "by a girl, or by a young woman, " or by a woman advanced in years, nothing must be " done, even in her own dwelling-place, according " to her mere pleasure."(2) Failing relations of her husband, she is to reside with her own, enjoying their protection, and being subject to their control. *If she do not like to burn*, the alternative for her is a life of austerity and privation;(3) for the securing of which it is, that her liberty, in disposing of herself, after the death of her husband, is thus restricted; the same reserve, for the same purposes, being also enjoined to her, in case of supersession,(4) or of her husband happening to be absent.(5) To the *virtuous* widow, persevering in the system of self-denial prescribed for her, not only are honour, and protection, and maintenance pledged during life, but the prospect also of heaven is expressly held out to her, *though*

(1) Menu, ch. IX. 2, 3.
(2) Menu, ch. V. 147, 148.
(3) Menu, ch. V. 150 to 161. Vishnu, 2 Dig. 459.
(4) Ante, p. 53. Append. p. 389.—C.
(5) Sancha and Lichita, 2 Dig. 448. Yajnyawalcya, 2 Dig. 450.

childless;(1) the intention of the law, with respect to whatever she possesses, being, consistently with the life ordained for her, that she should have the use and enjoyment of it, for necessary, including religious purposes, but not for lavish expenditure, and indiscriminate alienation, as humour, or fancy may prompt. Expected to live in the practice of austerities, with extinguished passions; foregoing every thing like shew in dress, and luxury in food,(2) her duty, with regard to what she may have inherited from her husband, is, to regard herself as little more than its tenant for life, and trustee for the next heirs, of the property to which she has so succeeded, together with its accumulated savings; being restricted from aliening it, by her own sole act, unless for necessary subsistence, or pious purposes, beneficial to the deceased.(3) If in any thing she may take liberties with it, it is in making pious and charitable gifts, with presents to her husband's relations and dependants, but not to her own without their assent; the concurrence of her legal guardians and advisers, as well as of her husband's heirs, being generally necessary to any alienation by her of such property;(4) by heirs here being meant, not the immediate

(1) Menu, ch. V. 156, et seq. Id. ch. IX. 29.
Datt. Mim. sect. i. 27. 29. Vrihaspati, 2 Dig. 462.
(2) Smriti, 2 Dig. 460, et seq. Mahabharata, Id. 467.
(3) Sheochund Rai *v.* Lubung Dasee; Beng. Rep. 1805. p. 24.
Id. 1812. p. 344.
Jim. Vah. ch. XI. sect. i. 56, 57.
Daya Crama Sangraha, ch. I. sect. ii. 3. 5. Append. p. 396.—E.
(4) Jim. Vah. ch. XI. sect. i. 56. 63, 64.
3 Dig 463 to 473. Id. 576, 626. et seq.
Sheochund Rai *v.* Lubung Dasee, Beng. Rep. ante 1805. p. 24.

ones merely, but the whole, living at the time; their assent to be manifested by their attesting the conveyance, or by other expression of it in writing.(1) The restriction however, in the extent stated, seems to concern *land* only; with this difference between the Bengal and the Benares schools, that the former confines it to such as has been derived from her husband, the latter, as it prevails to the Southward, applying it to land held by her under whatever title;—the law also requiring a deed and seisin to perfect the transfer;(2) whereas, with regard to *moveables*, (*slaves* excepted, which are subject to the condition of land) she has a greater latitude, reserving always a half for the due performance of his funeral obsequies.(3) That she should be under some such control as has been mentioned, seems so far reasonable, since, as her husband's relations, are bound to provide for her in case of need, it would be hard if they had not the means of preventing her, by her improvidence, from falling into distress, and so requiring their assistance. To this extent, therefore, their interference, not degenerating into any treatment unnecessarily harsh, much less insufferably cruel, might be deemed to

Beemlah Dibeh v. Goculneth; Id. p. 32.
Mahoodá, &c. v. Kulcani, &c. Id. p. 67.
Gungarum Baduree v. Kasheekaunt R.; Id. 1813. p. 363.
Append. p. 390. 392. 398.
Gopulchund Chuckarwurtee v. M. Rajranee; Beng. Rep. 1816. p. 500.

(1) Mohun Lal Khan v. Ranee Siroomunnee; Beng. Rep. 1812. p. 349.
Roopchurn Mohapater v. Anundlal k. Id. p. 353.

(2) Jim. Vah. ch. IV. sect. i. 23, note.
Narada, 3 Dig. 575.—Catyayana, Id. 576.
Sham Singh v. M. Umraotee; Beng. Rep. 1813. p. 395.

(3) Sreenarain R. v. Bhya Jha; Beng. Rep. 1812. p. 345.
Mohun Lal Khan v. Ranee Siroomunnee; Id. p. 352.

be within the scope of that *domestic* authority, the exercise of which, as legitimate, has been preserved to the natives by the legislature, in those acts, upon which the charters, establishing the King's Courts at the several presidencies, are founded.(1)

II. As to the *property* of the widow. Her right of *inheriting* to her husband under certain circumstances, and, where that does not attach, her claim to be *maintained*, having already been discussed in their respective chapters;(2) and her power of *alienation* having also been incidentally adverted to, in treating on the dependance to which her person, and the whole of her conduct is liable,(3) it remains to notice how such property, as she possesses, howsoever derived, *vests at her death;* distinguishing between what she holds in right of her husband, and her *Stridhana*, which, as has been formerly seen, is more emphatically her own.(4)

It has been seen, in a preceding chapter,(5) how the property of a woman descends, she dying in the lifetime of her husband. Of that which devolves on her from him, he dying, leaving no male issue, nor adopted son, nor son otherwise derived from him,(6) the landed part of it, or

(1) Sheochund Rai *v.* Lubung Dasee; Beng. Rep. ante 1805. p. 24. 21 Geo. 3. ch. LXX. § 18.—37 Geo. 3. ch. CXLII. § 40.

(2) Ante, ch. VII. p. 154. ch. X. p. 231.

(3) Ante, p. 244.

(4) Ante, p. 25.

(5) Ch. II. p. 50.

(6) Append. to ch. p.

whatever comes under that description, descends on her death to *his* heirs, not to *hers:* the principle being, that it vests in those who would have taken it upon his death, had she at the time not existed. This, in the case supposed, is the daughter, or daughters of her husband, if he have left any; for the sake (as is said) of the male issue, which they have, or may have. So say the writers of the Eastern school. (1) But, according to the Mitacshara, (2) and its followers, property, which the widow may have acquired by inheritance, is transmissible to her own heirs; classing with this school as part of her *Stridhana;* of the descent of which some account is next to be given, the nature of it having been already explained, in a former chapter. (3)—Denominated "*woman's* "*property*," its peculiarity is seen in nothing more than in the intricacy with which succession to it is regulated; depending, as it does, not upon rules, or texts, relative to property left by a man, (4) but upon the *form of marriage*, (5) the *source* from which it has been derived, or the *time* when it was *acquired.* Belonging to an *unmarried* female, with exception of a nuptial present, (which, where it exists, reverts on her death to the bridegroom,) her *Stridhana* goes first to her uterine brothers, (6) and,

(1) Jim. Vah. ch. IV. sect. i. 7. Id. XI. i. 57, et seq.
3 Dig. 468. 472, et seq. 576. 626.
Mt. Bijya Dibeh *v.* Mt. Unpoorna D.; Beng. Rep. 1806. p. 86.
(2) Mit. on Inh. ch. II. sect. xi. 2, and note.
See Beng. Rep. 1812. p. 344. Append. p. 392 to 398.
(3) Ante, ch. I. p. 30.
(4) 3 Dig. 601. 603.
(5) Mit. on Inh. ch. II. sect. xi. 30.
(6) Id. 30.

failing them, to her parents in succession, the mother taking before the father;(1) and if to a *married* one, whether she die living her husband, or a widow, the immediate heirs to it, including personalty inherited from her husband, with land also according to the Mitacshara, are her lineal descendants in the female line;(2) the reason of which is not very creditable to the good sense of the law, founded as it is, on a supposition, that *portions of the mother abound in her female children;* the notion being, that "a male child is procreated, if the seed pre-" dominate, but a female, if the woman contribute most to " the *fœtus;*" (3) so apt were the old Hindu lawyers to mix, with their gravest reasonings, ideas not less absurd, than, according to *our* conception, indelicate. The course of succession, in the female line, is the same with that which is established, where daughters inherit, mediately or immediately, to their father. (4) After daughters, and grand-daughters, the property in question goes to sons, in a certain prescribed order;(5) and, in default of all issue, the succession varies, according to circumstances. The marriage having been *in an approved form,* and the wife dying without issue, the husband, (surviving,) and his kin successively, are her heirs;—if *in any of the*

(1) Jim. Vah. ch. IV. sect. iii. § 7.
Gautama, 3 Dig. 614.
Baudhayana, Id. 612. 615.
(2) Menu, IX. 131. 192, 193. 195.
Mit. on Inh. ch. II. sect. xi. 9. 12, et seq.
3 Dig. 589. 595. 597. 600. 607.
(3) Menu, ch. III. 49.
Mit. on Inh. ch. I. sect. iii. 10.
(4) Ante, ch. VII. p. 159.
(5) Mit. on Inh. ch. II. sect. xi. § 9.

less approved ones, her own;(1) and one course is ordained with reference to what was obtained by her *on her nuptials;* another, as to what may have been acquired by her during her *coverture.*(2) Beside which, other distinctions prevail, particularly with respect to her *fee*, or *perquisite*, described by some, as the present made her upon soliciting her in marriage,(3) by others, as the bribe to induce her to go to her husband's house, upon its final solemnization.(4) Adverting to each, the law has settled the succession to the greatest imaginable extent; as will appear by reference to the works that treat at large on the subject,(5) including the "Summary" by Sricrishna, subjoined to the appropriate chapter in the Daya Bhaga of Jimuta Vahana,(6) and which will be found in the Appendix to this work.(7) To what extent these distinctions prevail in practice, can only be known by local investigation; *usage* being a branch of Hindu law, which, wherever it obtains, supersedes its general maxims.(8)

(1) Menu, IX. 196, 197.
Jim. Vah. ch. IV. sect. ii. § 24, 25. sect. iii. § 2, et seq. and § 6.
Mit. on Inh. ch. II. sect. xi. § 10, 11. 3 Dig. 606.
Append. p. 399. 400.—C. E. and D.

(2)

(3) Note to Jim. Vah. ch. IV. sect. i. § 5.

(4) Jim. Vah. ch. IV. sect. iii. § 21.
Mit. on Inh. ch. II. sect. xi. 5. 3 Dig. 570. Ante, p. 28.
Daya Crama Sangraha, ch. II. sect. iii. 17, 18.

(5) Jim. Vah. ch. IV. Mit. on Inh. ch. II. sect. xi.
3 Dig. 557.
Daya Crama Sangraha, ch. II. sect. iii. 4, 5.
Prankishen Sing v. Mt. Bagwhutee; Beng. Rep. ante 1805. p. 3.

(6) Jim. Vah. p. 100.

(7) Append. p. 402.

(8) Menu, ch. I. 108. 110. Ch. VIII. 3. 41. 46. 1 Dig. 95.
M. Sutputtee v. Indranund Jha, Beng. Rep. 1816. p. 512.

It being far from the purpose of these pages to uphold, with reference to the Hindus, any system, whether of abuse, or of unmerited admiration, but their object, on the contrary, being, to represent, with all practicable exactness, a faithful outline of their *institutes*, within the professed limits, as the same is to be collected from resources within our reach,—the deformity of their law, as it, in many particulars, respects the sex, especially in its widowed state, has been impartially exhibited. Ungracious as it may appear, the question will still occur, as to the *degree* in which such a code of restraint and privation is acted upon; *how* it operates in families; what may be the *real*, as well as the *legal*, state of widowhood, among these people. To resolve this, resort must be had to the works of such, as have had an opportunity of looking into the interior, and detail of Hindu life; if any there be, whose account of so delicate a subject can be relied upon. Nor is it intended to repress any just indignation, to which that deformity is calculated to give rise, by the recollection, that, however odious, its parallel is found among the most renowned nations of antiquity. A few words will suffice to assimilate the condition of the sex among the old Romans. *Mulieres omnes*, (says Cicero,) *propter infirmitatem consilii, Majores in tutorum potestate esse voluerunt:*(1) and Livy, to the like effect, *Nullam ne privatam quidem rem agere fœminas sine auctore voluerunt; in manu esse parentum, fratrum, virorum.*(2) It was the same before them with the Greek

(1) Cic. pro Muren. 11.
(2) Liv. xxxiv. 2.

women; nor can these strictures in this respect be better closed, than by the following extract from a late elegant little work, on the states of ancient Greece, whose institutions the Romans copied; exhibiting, with regard to the vassalage of the sex, the substance of many a text of Menu, and yet not a perfect picture of it, as it existed at the time to which the account refers; omitting, as it does, all allusion to that extraordinary feature, already noticed, the power of the husband to dispose of his wife by *will*, to any man whom he might choose for his successor.(1) Speaking of the Athenian women, in an age too of refinement, "They lived (says the learned and ingenious au- "thor) in a remote quarter of the house, and were never "allowed to mingle in society with the men. They were "not permitted to go abroad, without being attended by "a slave, who acted as a spy upon their conduct. They "were given in marriage without their consent; and were "expected to make the care of their families the sole ob- "ject of their attention. In a funeral oration composed "by Plato, in the person of Pericles, he makes that illus- "trious statesman exhort the Athenian women, to mind "their domestic concerns; and assure them, that they "would be most faithful in the discharge of their duty, "when they never attracted the notice of their fellow ci- "tizens."(2)—Thus verifying, perhaps, with reference to distant ages and countries, the complaint of Medea in Euripides,

Γυναῖκες ἐσμὲν ἀθλεώτατον φυτὸν;

(1) Ante, p. 59.

(2) Hills' Essays on the Institutions, &c. of the States of ancient Greece, p. 266.

upon which it may be remarked, that whatever is selfish and illiberal recoils commonly, in a variety of ways, upon those who promote it; and that, in the instance in question, the system adopted, discreditable to man, in proportion as it outrages nature, probably never realized the purpose in view.

CHAP. XII.

ON THE TESTAMENTARY POWER.

It having been long since observed by Sir William Jones, and being a thing agreed, that the Hindu law knows no such instrument as a *will*,(1) nor any power in the owner of property so to dispose of it, an apology may be expected for a chapter on the subject. The truth is, that, by the law in question, (as under other ancient codes, including our own,(2)) if not previously distributed in his lifetime, property has been left to descend, on the death of its owner, to his heirs. He has not been allowed to designate *who* should enjoy it after him, the law having not only established a course of inheritance, intended to be indefeasible, and which in general is so, but having also made an equitable provision for female issue, and a variety of collateral dependants, where they exist; guarding, at the same time, what it has so ordained, with the most anxious care, by suitable restraints upon alienation. The line of heirs extends (as has been seen) beyond the relations of the deceased, to connexions and claimants no way allied by blood;—all of whom failing, the doctrine of escheats here, as in other countries, steps in, vesting in

(1) Note to 2 Dig. 516.

(2) Hæredes, successoresque sui cuique, *liberi*; *et nullum testamentum*. Tacit. de Germ. § 20.

the sovereign an ultimate right of succession, where no other prescribed one can be shewn. (1) This being so, whether the son have, by *nature*, a claim to succeed to his father's property, it becomes immaterial to inquire; sufficient be it, that he has it by *law*. And, if so, it is idle to be considering whether the unqualified concession may not make heirs disobedient, and headstrong, such arguments cutting both ways;—since a contrary doctrine has a like tendency to render parents capricious and arbitrary, to which the Hindu law has shewn itself awake, by protesting against the effect of *such a partition*, by a parent in his lifetime; (2) while it has shewn its consistency, by proscribing, as incapable of a share, an "enemy to his father." (3) Any apology then for what follows, if required, must be sought for, in the practice that has obtained, among the Hindus at our Presidencies, of indulging in the liberty of *wills*, for which their language has not even a name. (4) That *we* possess it, can be no plea for our sanctioning it in *them;* the less, that, in the extent in which it is allowed to us, it has been disapproved by the author of the Commentaries; who, recognizing the claim of children on the property of their parent, observes that "it had not been amiss, if he had "been bound to leave them at the least a necessary subsist-"ence." (5) Such being the indisputable Hindu law, as in force to the Southward, and the Courts at our Presi-

(1) Ante, ch. VII. p. 170.
(2) Ante, ch. V. p. 123.
(3) Mit. on Inh. ch. II. sect. x. 3. Vid. tam. ante, p. 219.
(4) Append. p.
(5) Blackst. Comm. vol. i. p. 450. See also vol. ii. p. 373, 12th edit. 8vo.

dencies having been, in all time, in matters of inheritance, sworn to administer justice to the Native according to *his own*, in contradistinction to *ours*, it may be difficult, at this day, to account satisfactorily, and with credit to the first innovators, for the principle upon which, within those limits, so great, and, it may be added, so pernicious an anomaly, as a Hindu *will*, was originally sustained. With respect to Madras, beginning, as it did, in the Mayor's Court, but too much reason exists, for apprehending, that it originated in motives not of the most honourable nature; being a device, by means of which *native* property, to a great amount, became subject at the time, and long after, to European management. So unseemly a period, indeed, has passed away; having been succeeded by a purity, not only in the exercise of government, but in the administration of justice, also, upon which it is consoling to reflect. The practice however subsists; and being, with reference to the individuals concerned, essentially vicious, it remains open to examination; and one thing seems plain, that, in affirming it, Courts must have a resting place somewhere. Neither in the English, nor in the Hindu law, can they find any. The latter, as in force to the Southward, repudiates every idea of the kind, in the form and extent to which it has been attempted to carry it; and, for the English, it is excluded by our Charters, wherever *the inheritance of the native* is concerned. Can then the right of a Hindu, to dispose of his property by will at Madras, be referred to *custom? Custom* is a branch of Hindu, as it is of our own law. "Immemorial custom (says Menu) is transcendant

"law."(1) But, how does he define it?—pretty much as my Lord Coke would define it, by "good usages, long "established."(2) And what are *good usages* for this purpose?—"practices not inconsistent with the legal "customs of the country."(3) Can the practice in question be considered, for the Hindus, as a *good usage long established?* Originating in corruption, its establishment is as yesterday; and it violates their most important institutions, as well as our own Charters. Should it nevertheless be contended, that, within the limits of the King's Courts at Madras, the Hindu must now acquiesce in the exercise of the power in question, bound by the practice that has obtained, the difficulty will be to define it;—to declare the extent of the obligation, and to settle by what law the details of such power are to be governed.

To suppose, then, the case of a will by a Hindu, setting aside the legal heirs, and every other claimant on the property of the testator, in favour of some artful Brahmin, possessing, and exercising an *influence* over him, in his dying moments, sufficient to induce him to *sign* such an instrument, and yet not sufficient, according to the cases in Westminster Hall, liable to be cited on such an occasion, to warrant the Court in rejecting it. The Hindu law contemplates the possibility of so monstrous an alienation, by deed to take effect in the lifetime of the maker; denouncing him as insane, and declaring it

(1) Menu, ch. I. p. 108.

(2) Menu, ch. I. 110. 118. Id. ch. VIII. 3. 41. 46. 1 Dig. 95. M. Sutputtee v. Indranund Jha; Beng. Rep. 1816. p. 512.

(3) 1 Dig. 337.

null upon that ground; like the reasoning of the civil law, in the case of an in-officious testament. As the attempt, therefore, by a Hindu, would be one which his own law, as in force to the Southward, would not tolerate for a moment, the best course would be to set such a will, if offered in judgment, entirely aside; as would probably be done even at Bengal, where the testamentary power is established.

But, without going the length of total disherison, an alienation by means of a will may be attempted, far exceeding the legal power of a Hindu testator; and rights may be trenched upon by it, which the Hindu law, as in force to the Southward, has been most anxious to guard. Indeed, it is almost of the essence of a testament that it should be so, more or less; according to an observation, frequently applied to a Hindu will, that if *contrary to Dharma Sastra*, it is invalid;—if *in conformity* with it, unnecessary.(1) Upon this principle, it has been the course of the Southern Pandits, to whom occasionally such wills have been referred, to try them by the provisions of the Hindu law, with respect to *gifts*, and *partition during the life of the father*, and to reform them accordingly; it being competent to a Hindu to make a *gift*, to which it will be the duty of his heirs to give effect after his death;(2) as it is for him, if he so think proper, to *distribute* his property among them in his lifetime, thereby not defeating, but, on the contrary, affirming, and anticipating their right of inheritance.(3)

(1) Append. p. 409.—E.
(2) Append. p. 110.
(3) Ante, p. 229.

Should it be proposed, to discontinue the practice of recognising, in any respect whatever, an instrument purporting to be a will by a Hindu, as being the exercise of a power unknown to their law,—unless executed at least with the formalities of a *deed of gift*, and of course carrying with it the consent of parties interested;(1)—or otherwise with those of a *partition of heritage*, subject also of course to the rules prescribed for that species of alienation;—such would undoubtedly be, in a sensible degree, a corrective of the error that has been allowed to take partial root, liable perhaps to no material objection, other than the opening it would still leave for litigation, to try, upon the principle stated, if the will could, or could not be received; a propensity but too apt to be encouraged, and from which, expensive as its indulgence unavoidably is at our Presidencies, the Hindu has a claim, by all fair means, to be protected.(2) This will best be done, in the instance in question, by allowing him the benefit of his own law, in the important article of inheritance. But, if the use of wills, so far as they have been improperly permitted, be still to prevail among the Hindus, in the extent to which the practice of allowing them exists, (which, to the Southward, it is believed, is only within the limits of the King's Courts,) it may be convenient to repeat succinctly the legal grounds, upon which alone they can, with any propriety, be continued and sustained.

(1) Sham Sing *v.* M. Umraotee: Beng. Rep. 1813. p. 394.

(2) See a curious passage, expressive of the horror of litigation, in a deed of compromise, between a party (a Hindu) claiming by adoption, and the remote heirs; by which they agreed together to divide the property.—Sreenarain Rai *v.* Bhya J[illegible], Beng. Rep. 1812. p. 310.

In Bengal, Hindu wills seem to derive their support from the two following considerations: 1. Considered as a deed of gift, to take effect at a future time, on the demise of the donor; subject to all rules affecting gifts. (1) 2. That the dominion of the owner over his property is so far absolute, that any exercise of it whatever will be valid and irreversible *in point of law*, how objectionable soever the act, in *a moral* point of view. In the *Nuddea* case, (to be referred to more particularly in a subsequent page,(2)) an authority was cited, (that of *Govindo Nanda*,) reprobating, as absurd, the allowing to be valid, what had been forbidden to be done. The distinction however between acts *void*, on the ground of some legal disability in the person of him by whom they are performed, and acts *prohibited* only, on account of their inexpediency, is too firmly rooted in the doctrines of the school alluded to, to be now shaken. But, inasmuch as it is confined to those provinces, and not only not recognized, but disclaimed by the authorities prevailing to the Southward, the ground upon which alone the doctrine of wills can stand there, is very much narrowed. Admit that a Hindu there may do by testament, what he could have done by partition among his sons, or otherwise by donation; which is allowing all the force that can be given to such a will, by taking it as a *gift*, in regard to what the testator had power to give, or as a *partition*, in regard to what he might have distributed, but could not have given; the result would be,(3)

(1) Append. p. 415. 419.—C.

(2) Post, p. 262.

(3) Ante, p. 18.

1. By way of admission, that a *separated* or sole owner of property, having no male descendants, nor other family, may dispose of it as he pleases.

2. But that even a *sole* owner, in respect of *land*, whether hereditary or acquired, having a family, cannot, by any act, without their concurrence, deprive his sons of their legal shares, nor the rest of a sufficiency for their maintenance. And that, where there is no land, they must all be provided for, to that extent, out of his personalty.(1)

3. That, however different in this respect the law may be at Bengal;(2)—according to the doctrine of the Benares school, as prevalent to the Southward, a member of an undivided family must first obtain partition, before he can exercise individual ownership over his right in the joint property, without the consent of his coparceners; a gift of undivided property, without such consent, being regarded by the Mitacshara (3) as incompetent; at least so far as regards the *realty;* for, as to *moveables*, he appears to be at liberty to make gifts on motives of natural affection, but not even with regard to these, to the extent of the whole of his property.(4) Subject to this, the Smriti Chandrica declares, that restitution of a *prohibited* gift, as well as of a *void* one, shall be enforced by the

(1) Mit. on Inh. ch. I. sect. i. 27.
Sham Sing *v.* M. Umraotee; Beng. Rep. 1813. p. 395.
Menu, cited in 2 Dig. 112.
Sricrishna, note to Jim. Vah. ch. II. 26.

(2) Rajbhulub B. *v.* Mt. Buneta Do; Beng. Rep. ante 1805. p. 48.

(3) Mit. on Inh. ch. I. sect. i. 30.

(4) Mit. on Inh. ch. I. sect. i. § 27. 30.

Sovereign authority; the property not having been transferred, nor a new right vested. It is to be recollected, however, that separate acquisitions, by a member of an undivided family, so made as to render them exclusive, and impartible, are as much sole property, to all intents and purposes, as though the maker had been, at the time, divided, and separate. (1) And that, even with respect to *prohibited* gifts, they "may be valid, under the exceptions "which the law allows; such as distress, necessary sup- "port of the family, and pious uses, arising from indis- "pensable duties."(2)

In Bengal, where the power in question has been long exercised, opinions, carrying with them great weight, have not been wanting, that, supposing it to be *res integra*, not even there, according to the law of the Daya Bhaga of Jimuta Vahana,(3) (the ground-work of the law of inheritance in that part of India,) could a Hindu, having sons, consistently with it, by any means, and of course not by *will*, (a mode of conveyance alike unknown to that work and to the Mitacshara,) be permitted to alien his real ancestral estate in land, without their consent. But the contrary having been, over and over again, determined, the point there is probably not now admitted to be debateable, whether in the Supreme Court, or in the *Sudder Dewanny Adawlut*. (4) A leading case to this purpose is one decided in the Supreme Court at Calcutta,

(1) Anto, p. 189.
(2) Mit. on Inh. ch. I. sect. i. § 29.
(3) Jim. Vah. ch. II. § 23.
(4) Append. p. 419.—C. and p. 432.—S.

about the year 1789,(1) where the testator, a Hindu, the father of four sons, and possessed of property of both descriptions, ancestral and self acquired, having provided for his eldest by appointment, and advanced to the three younger ones in his life the means of their establishment, thought proper to leave the whole of what he possessed to his two younger ones, to the disherison of the two elder, of whom the second disputed the will; but it was established, on reference to the Pandits of the Court. Their answers were short; simply affirming the validity of the instrument, according to the *Shaster*. Now the *Shaster* knows no such instrument as a will. But, considered as a gift to the two younger sons, in exclusion of the two elder, the ground with the Pandits probably was (the Bengal maxim) that, however inconsistent the act with the ordinary rules of inheritance, and the legal pretensions of the parties, *being done*, its validity was unquestionable. Sir Robert Chalmers, and Sir William Jones, being both on the bench at the time, concurred in this determination. About the same time occurred the *Nuddea* case, in appeal from a decree of the inferior Court at Kishnagur, heard and finally determined, in the *Sudder Dewanny Adawlut*, the grand Court of Appeal for the whole of the Bengal provinces.(2) It was the case of one of the great Zemindaries of the country, which the Testator, the Raja, having enjoyed during

(1) Russichlol Dutt and Hurnaul Dutt, Executors of the will of Modun Mohun Dutt *v.* Chortanchuru Dutt; Beng. Rep.

(2) See a short Note of it in the Beng. Rep. ante 1805, p. 2, under the name of Eshanchund Rai *v.* Eshorchund Rai.

his life under the will of his father, to the exclusion of his three brothers, left by will to his son; against whom one of his uncles instituted a suit for the recovery of his fourth share, disputing the right of the grandfather, so to dispose of property that was ancestral. The question was discussed upon the will of the grandfather of the defendant, which appears to have been an assignment in trust, by way of gift to his eldest son, the elder brother of the plaintiff, in contemplation of death; providing to a certain degree for his other sons, but very inadequately, compared with what they would have been entitled to, had they been allowed to succeed to their legal shares. The latter of the two wills recited that the Zemindary *never had been divided;* but that, pursuant to the custom of the country, it had always been enjoyed by the eldest son; in consideration of which the Testator had left it to the defendant, being his eldest son, in the presence of the Brahmins of *Nuddea*, whom he had assembled to be witnesses of the gift. Accordingly, the defendant contended, independant of the will, that the estate in question, according to the nature of it, was his, in right of inheritance; and it was proved in the cause in point of fact, that it had always been enjoyed by one son, in exclusion of the rest, though not uniformly by the eldest; but sometimes by the one deemed the fittest to manage a property of that description, pursuant to the spirit of the Hindu law in that respect.(1) The means resorted to by the Court of Appeal, for information as to the law,

(1) Ante, p. 112.

appears to have been as extensive as possible; references having been made, not only to numerous Pandits named by either party, but to the Pandits of the several Courts in the Provinces, as well as to those at the Presidency; among which latter was Jagannatha Turchapunchanana, the compiler of the Digest. And, though a great majority, including Jagannatha, were in favour of the acts of the two Testators, upon the general ground of the competency of a Hindu to dispose of his property as he pleases, without regard to the nature of it, whether ancestral or acquired, public or private, yet the Court, affirming the decree, which had been in favour of the defendant, expressly made the *nature* of the property, and the *course* in which it had always been enjoyed, *according to the custom of the country*, an ingredient in their determination; as may appear from the extract inserted in the Appendix. (1) It is to be remarked also in this case, that all the authorities cited and relied upon by the Pandits, in support of the title of the defendant, are, as was naturally to be expected, *Bengal* authorities; among which no mention is made of the Mitacshara, the Smriti Chandrica, or the Madhavya. Another thing to be remarked is, that the Court, not satisfied with the sum specified in the former of the two wills, as a provision for the plaintiff, (being only 250 *rupees* per month,) took upon itself to increase it to 500, upon the ground, as the decree declares, "that the former sum was inadequate to his "situation and circumstances." This tends to shew that

(1) Append p 435.

even, in Bengal, under the modern practice, the father of a family, according to his means, cannot leave it inadequately provided for, much less entirely destitute. The *Nuddea* case was followed by others to the same effect;(1) not, however, altogether without question. Among these may be noticed (in 1807,) that of the *Mullicks*, in the Supreme Court, a case also of importance in point of value, involving the right to above half a million sterling; in which six, out of eight sons, disputed the power of their father to dispose by will, to their prejudice, of such part of it as was ancestral, though they each took by it three *lacks of rupees;* but the Court, without referring to their Pandits, were in that respect unanimous in its favour, considering the point as already settled. In all these cases, however the other members of the family may have been left, the sons of the Testator, where there existed any, were, more or less, provided for by him; and, where the provision made by him was deemed inadequate, the Court took upon itself to increase it. These are important facts, though not in favour of the testamentary power, as founded in legal right; and it is to be here remarked, that, where the case was to be governed by the law, as current in *Mithila*, the contrary of the cases last referred to was determined by the *Sudder Dewanny Adawlut* of Bengal,(2) after consulting their Pandits, who held an attempt to aliene family property as invalid, for want of seisin given in the life of the owner.

(1) Rodhamunee D. v. Shamchundur; Beng. Rep. ante 1805.
Rankoomar v. Kishunker; Id. 1805. p.
Gungaram Bhaduree v. Kasheekaunt; Id. 1813, p. 363.
(2) Sham Sing v. M. Umraotee, Beng. Rep. 1813. p. 395.

At Bombay, whatever may be its practice, the law is the same as at Madras, and throughout its dependant territories.(1) That, at the latter Presidency, it neither knew, nor could endure the power exercised in this way by Hindus, over their property, occurred early, in the discharge of his judicial function, to the author of this work.(2) With this impression, the Supreme Court there desisted after a time from granting probates of wills, in the case of *native* estates; the practice of granting which had been established in the Mayor's Court, and followed, during the short period of its existence, in that of the Recorder;—and, at length, in 1812, the question of a Hindu *testament* (which had been frequently *mooted*) was raised in an equity suit; in which the Bill, founded upon a claim under the will of a Hindu, was dismissed, on the ground of the incompetency of the will, as a mode of conveyance. But, as the property disposed of by it was *undivided* property, a re-hearing was allowed, in order to see whether it might not be sustainable, to the extent of the Testator's share, at least with regard to such of it as had been acquired by himself; but the opinion of the Court was not finally taken upon this more confined view of the subject:(3) nor did the question again occur, while the author continued to sit upon the Madras bench. Upon that occasion, however, according to his accustomed practice in like cases, he sought in all directions for that information, which, obtained, has enabled him, with propor-

(1) Append. p. 437, 438.

(2) See the case of Veerapermall P. v. Narrain P.; Notes of cases at Madras, vol. i. p. 103.

(3) Append. p. 440.

tioned confidence, to compose the present chapter, as well as so much of the first in particular, as regards the right of alienation. For how much of such information he is indebted to Mr. Colebrooke, will be seen in the Appendix. And, if the author shall not, by this work, have redeemed, in any degree, the debt which every man is said by my Lord Coke to owe to his profession, he will at least, by the Appendix to it, have conferred upon the public an inestimable obligation, in collecting, and communicating such a body of "Remarks" as it contains, upon the most important points of Hindu law, as connected with the subjects that will have been discussed; the largest proportion of them from the pen of him, whose learning in that abstruse science, drawn directly from original, and the most authentic sources, stands acknowledged in Europe, as well as in India; and which, great as it confessedly is, has, if possible, been surpassed, by the liberality with which it was imparted.

CHAP. XIII.

ON CONTRACTS.

HASTENING at length into port, after a sufficiently tedious and perplexed passage, through a sea hitherto but little explored, it is not intended to dwell upon the subject of this, the concluding chapter, beyond what its exigency may seem indispensably to require. Not that it is not, in the circle of civil law, one of the greatest concern. Were it to be asked, what constitutes the subject of *Contracts?* it might with propriety be answered, "*quicquid agunt* " *homines.*" Scarce a day passes with any man, who has any thing to do with the business of life, that he is not entering into, executing, or fulfilling one, of some kind or other. Their diversity is infinite; and the objects involved in them often vast, and most important. But, in the first place, they rest, for their formation and solution, upon principles so general, that they have been considered to belong to the law of nature, as manifested in the concurrent practice of civilized nations; and, therefore, in essentials, as common alike among all people. And, secondly, these principles, bottomed in reason and convenience, and inculcating universally the purest good faith, are to be found already so discussed in innumerable treatises, that, excepting with some special view, the field is scarcely open. At the same time, they must be ad-

mitted to be a part of the law of nature, that is modified, more or less, every where, by local institutions and usage; and the British Charters having, moreover, directed, that as well with regard to matters of CONTRACT, as of INHERITANCE and SUCCESSION, where the question shall be between *Natives*, the *native law* shall determine, some attention to the *Hindu law of Contracts* would appear to be of course, in a work professing to embrace the elements of that law generally, with reference to British judicature. Referring, then, in particular, for more systematic views of the subject, to the celebrated treatise of M. Pothier, of Orleans, as translated and edited by a learned jurist, not long since deceased;(1)—together with a still later one, so far as it goes, equally comprehensive, and more compact, by Mr. Colebrooke; of which the introductory matter, with the continuation, remain as *desiderata*,—it is to be seen, what is proposed to be done here. Of the Digest, of which, in the preceding chapters, such frequent use has been made, Successions and Contracts, being the professed subjects,—that of Contracts is made to occupy nearly one half of the whole. But the compiler has included, with a large proportion of irrelevant matter, some, not in general classed under this title; as, for instance, not only *marriage*, but the numerous and various duties to which it gives birth. That marriage is a contract; and that the Courts are bound to administer to parties the law of their faith under this head, is unquestionable. But the scheme of this work has already included it, with every consider-

(1) Mr. (afterwards Sir W.) Evans, late Recorder of Bombay.

ation that it involves, under a different distribution; nor, considering how little it has been admired, is it intended, as to what remains, to follow the arrangement either of the Digest, or of Menu; but to adopt one more consonant perhaps to our own notions; by collecting, into one point of view, the most material observations, as applicable to Contracts in general; and then considering the most usual sorts, in the order in which they may naturally present themselves; confining the statement to such points, connected with the subject, as are either *peculiar* to the Hindu law,—or, with regard to which, it may, from their nature, be satisfactory to see, how far it is, with reference to them, *coincident with our own.*

I. *Intention,* and *consent,* being the soul of every agreement, the Hindu law has evinced great care, that the *mind* of the parties shall be in a condition at the time, to be capable of contracting.(1) Hence, the ordinary disqualifications of minority, lunacy, and idiotcy, prominent in every code of law, occur in this:(2) in which the competency of the lunatic, during a lucid interval, is admitted.(3) With the *insane* person is classed, for this purpose, one intoxicated, or incapable through extreme disease;(4) and the case of minority is construed to comprehend that of decrepit old age;(5) the party, in all these cases, being considered to be *non sui juris*; and, in all of them the

(1) Menu, ch. VIII. 168.
(2) Menu, ch. VIII. 163. Yajnyawalcya, 2 Dig. 193.
(3) 2 Dig. 193.
(4) Menu, ch. VIII. 163. 2 Dig. 191, 192.
(5) 2 Dig. 187.

contract, so effected, declared by Menu to be utterly null.(1) Upon the same principle, the law watches the influence on the mind of the various passions, by which it is apt to be disturbed; as of fear, anger, lust, and grief; holding as not done, any thing done by one, while so agitated.(2) These disqualifications are chiefly expatiated upon, under the law of *gifts*,(3) to which the law of *contracts* refers; the same causes being regarded as productive of the same invalidating effects, in the one case, as in the other.(4) A distinction, however, is to be attended to, between those that operate as a *bar*, such as idiotcy, or lunacy; and those, in which an account may be taken of concurrent circumstances, toward assisting to determine, how far the imputed disability is to be sustained, in order to justify the *nullity* contended for. The case of an agreement, for instance, under the circumstance of inebriation, is one, in which the English and the Hindu law will alike balance, in coming to a conclusion.(5) And the same remark may apply to more of the questionable ones that have been specified; so as to afford ground to discriminate between contracts, so circumstanced, as not to be capable of standing inquiry for a moment, and such as only require to be subjected to a very strict one, before they are allowed. In a system, in which men are protected against their own acts occasioned through *fear*, it follows that *force*, con-

(1) Menu, ch. VIII. 163.
(2) Narada, 2 Dig. 181, 182. Yajnyawalcya, 2 Dig. 193. Catyayana and Vrihaspati. 2 Dig. 197. Gautama, Id. 200.
(3) 2 Dig. 181.
(4) 2 Dig. 328.
(5) 2 Dig. 328.

straining the will, can never be allowed to attain its end; and, in none, is *fraud detected* less permitted to succeed. Nor is advantage to be taken of what was *not seriously meant*. "A true assent (says a learned writer on the uni-
" versal, including the Hindu law of the subject) implies
" a serious, and perfectly free use of power, both physical
" and moral. This essential (he adds) is wanting to pro-
" mises made in jest, or compliment; or made in carnest,
" but under mistake; or under deception or delusion; or
" in consequence of compulsion. Therefore, consent (he
" concludes) not seriously given, or conceded through
" error,—extorted by force, or procured through fraud, is
" unavailable."(1) And, so well is the whole of this summed up by Jagannatha, according to the express doctrine of the Hindu law, that, not to give, at length, in his own words, the passage alluded to, were an injury to the purpose of the present chapter. Commenting upon a text of Nareda, "where an owner (says he) discriminating
" what may, and may not be done, and guided solely by
" his own will, declares, as is actually intended by him,
" his own property divested, and dominion vested in a per-
" son capable of receiving, and designed by the donor,
" over the thing meant to be given,—such volition vests
" property in the donee. In cases of fear and compulsion,
" the man is not guided solely by his own will, but solely
" by the will of another. In the case of a man agitated
" by anger, or the like, he is not a person who discrimi-
" nates between what may, and may not be done. If, ter-

(1) Colebrooke, on Obligations, &c. p. 45.

" rified by another, he give his whole estate to any person,
" for relieving him from apprehensions, his mind is not in
" its natural state;—but, after recovering tranquillity, if
" he give any thing in the form of a recompense, the do-
" nation is valid. What is given as a bribe, or in jest, is
" a mere delivery, or a gift in words only; there is no
" volition, vesting property in another. As for what is
" given by mistake, as gold, instead of silver, which
" should have been given, or any thing delivered to a
" Sudra instead of a Brahmin, the gold and the Sudra
" are not the *thing* and the *person* intended, namely, silver
" and a Brahmin. Though it be ascertained that ten
" *suvernas* should be paid, if any how, through inattention
" or the like, fifteen *suvernas* be delivered, the gift is not
" valid; for they are not what was really intended to be
" given."(1)

Not only must the mind of the parties be in a legal state to contract, but the subject, or cause of their contracting, must be a competent one, according to the apprehension of the law. The provision with regard to this, consists principally in *negatives;* and here recourse may be had to what was delivered from the Bench, some century ago, by one of the Judges of England, in a strain of eloquent indignation, worthy at once his seat, and the occasion;—" This (said he) is a contract to tempt a man
" to trangress the law;—to do that which is injurious to
" the community; it is void by the common law; and the
" reason why the common law says such contracts are

(1) 2 Dig. 183.

" void, is, for the public good. You shall not stipulate " for iniquity. All writers upon our law agree in this; " —no polluted hand shall touch the pure fountain of " justice.—*Procul o! procul este profani!*" (1)—with more to the same effect; for all which, (noble as it is!) the Hindu, as well as the common law of England, would have supplied him with abundant authorities, had he (the eminent person alluded to) been at the time adjudicating among, and between Hindus. (2) Speaking of a bribe, (3) to give evidence, though true, or for subornation, (4) (being one instance of the *turpis causa*,)—" It " shall, by no means, be given, (says Catyayana,) though " the consideration be performed; and, he adds, if it " had been at first actually given, it shall be restored;" thinking, it seems, as has been thought by some of our own sages, that it is more consonant to the principles of sound policy, and justice, that, wherever money has been paid on an illegal consideration, it shall be recovered back again, by the party who improperly paid it, than, by denying the remedy, to give effect to the illegal contract. (5) As, whatever is given for an illegal act may be taken back, so, in the case of a good consideration, if unperformed, the contract fails. (6)

To consider next the case of the *wife*, and other dependant members of a man's family, with reference to

(1) Append. p. 442.
(2) Ch. Justice Willes; in Collins v. Blantern, 2 Wils. 347.
(3) 2 Dig. 195.
(4) 2 Dig. 196.
(5) Lacaussade v. White. 7 Term Rep. p. 535.
(6) Nareda, 2 Dig. 181. Vrihaspati, Id. 198. Menu, ch. VIII. 212, 213. 2 Dig. 172.

the power in question of contracting. And, as respects the wife, it may be taken to be commensurate with her right of property, as consisting in her *Stridhana*, (1) *land* excepted; the exception applying, in the Bengal provinces, only to such as may have been given her by her husband, of which she certainly cannot *dispose*, and with regard to which it follows, that she cannot *contract*. (2) Beyond this, it is laid down, very generally, in many places, that for *necessaries*, in support of the family, including herself, she may bind her husband by her contracts; (3) as a man's slave even has power to do, according to Menu. (4) The case usually put, is that of the *absence of the husband from home*; (5) when it is but reasonable, that an authority should subsist somewhere, to provide for his family, while it continues. (6) It is in the *absence of his master*, that Menu confers this right upon the slave. But, absence, in these texts, is construed to be illustrative only; (7) and, accordingly, Catyayana extends it to disability in the husband to act, arising from whatever cause; (8) as, for instance, from incurable disease;—including, among necessaries, for which provision may be made at his expense by others, the nuptials of his daughter, or disbursements for funeral rites. (9) And all

(1) 2 Dig. 129, 130. Ante, p. 25.
(2) Ante, p. 25.
(3) Nareda, 1 Dig. 295. Vishnu, Id. Catyayana, Id. 296.
(4) Menu, ch. VIII. 167. Daya Crama Sangraha, ch. XII. 1.
(5) Catyayana, 1 Dig. 17.
(6) Nareda, 1 Dig. 313.
(7) 1 Dig. 298. 320.
(8) 1 Dig. 296.
(9) 1 Dig. 296.

this (he says) may be done by his servant, his wife, his mother, his pupil, or his son,—*without his assent;* though, in another text, he supposes his assent to have been given; —unnecessarily, as the law would imply it:(1) but such implication may be rebutted, by proof of his having withheld it; in which case, there could be no recovery against him, however unworthy his conduct, in leaving his family destitute.(2) In certain trades, in which the wife is understood to have a special concern, she has a greater latitude;(3) and, universally, in proportion as the management of the family is confided to her, he is bound by her contracts.(4) To what extent and under what circumstances, an undivided family generally is bound by the engagement of any one, particularly of him who is the managing parcener, has already been seen, in treating on coparcenary.(5)

The Hindu law, in no instance, requires that a contract should be in writing; though it sets, upon all occasions, a due value upon written evidence.(6) It admits the benefit of one to be assigned, according to Jagannatha, and the reason of the thing; though it is remarkable, that, under the head of assignment, he cites no authority.(7) And, as an excessive, or illegal gift may be resumed, (the retraction of gifts being an express title of law,(8)) so may con-

(1) Catyayana, 1 Dig. 17. Id. 219, 220. Append. p. 1[illegible].
(2) 1 Dig. 298, 299.
(3) Yajnyawalcya, Vrihaspati, Nareda, 1 Dig. 318.
(4) 1 Dig. 318, 319.
(5) Ante, ch. VIII. p.
(6) 1 Dig. 19, et seq. Id. 393, et seq.
(7) 1 Dig. 90. Id. 189, et seq.
(8) Menu, ch. VIII. 4. 212, 213. 2 Dig. 179.

tracts, be rescinded; the law, in the one case, and in the other, nearly identifying,(1) as has been already remarked.(2)

II. Having thus considered, with reference to Hindu materials, the leading points, as regarding contracts generally, particular ones come next to be discussed, under the following heads, viz. 1. Of *bailment;* 2. of *loans;* 3. of *sale* or *exchange;* 4. of *debt.*—1. The contract of bailment claims particular attention, from its comprehensiveness, as well as its importance; being, in a simple, and general point of view, a contract only to return in due time what the owner has confided to the bailee, under a responsibility suited to its specific nature; with a view to which a certain degree of care is virtually stipulated; the extent varying with the object of the bailment, and constituting, for the most part, the point to be adjusted, in every case, in which a question upon the subject can arise. And, so nice a one is it often, that, from the difficulty of definition, authority has not been wanting, for referring it universally to the discretion of the judge.(3) The degree depends, in the first instance, upon whether the benefit, resulting from the bailment, be reciprocal between the parties; and, if not, to which of them it attaches; which is, in general, sufficiently obvious. Familiar as the subject must be, in every system of law, provisions regarding it abound in Menu, and other text-writers among the

(1) 2 Dig 328.
(2) Ante, p. 334
(3) Essay on the Law of Bailments, p. 25.

Hindus: and, admitting them (as has been remarked (1)) to be consonant to the principles established elsewhere, on the same subject, the agreement can scarcely be classed with that "*identity* of conclusions, which, in pro- "portion as the subject is not of technical institution, "pure, unbiassed reason, in all ages, and nations, sel- "dom fails to draw."(2) With regard to our own juridical system, confessedly the most material, if not the whole of the principles alluded to, have been imported into it, through Bracton, from the Romans. With us, therefore, there has been in this instance, no *such identity of conclusion drawn;* all has been derivation; nor can it be reasonably doubted that, with the Hindu law, have originated (so far as we can see) those provisions, applicable to the subject in question, which the wisdom of "ages and nations" the most civilized, has since been content to adopt. Of these, the standard, founded in the care that every prudent man takes of his own property,(3) remarkable as it is, is as old at least as Vrihaspati; who charges with the value, adding interest, "the bailee, that suffers a thing bailed to "be destroyed by his negligence, while he keeps his own "goods with very different care."(4) On the other hand, "if a thing deposited be lost, together with the goods of the "bailee, it is declared by various authorities, to be lost to "the *bailor;*"(5)—and numerous texts on the subject of responsibility, contain the equally remarkable exception,

(1) Essay on the Law of Bailments, p. 116.
(2) Id. p. 114.
(3) Id. p. 6.
(4) 1 Dig. 429. 411.
(5) 1 Dig. 420, 421.

(not of inevitable necessity, but, in identical terms,) of "*the* "*act of God*, or of *the King*." (1)

Hindu writers differ in their division of bailments; some enumerating four; (2) others six;(3) Sir William Jones acknowledging only five.(4) Not to multiply them, (as he says,) inconveniently, by extending inquiry to every possible case, in which a man possesses for a time the goods of another, the most important ones, as they occur in the Hindu law, (from whence, it is plain, they have been derived into other codes,) may be distributed, according to the principle that governs their responsibility; this depends upon the object and benefit involved; which may be entirely on the side of the *bailor*,—or on that of the *bailee;* or it may be *mutual*. Thus the *simple deposit*, together with the *commission without reward*, are, for the sake, and ensure to the sole advantage, of the *owner* of the thing bailed.—In *loans for use*, it is the *bailee*, or borrower, that is alone benefited. In the remaining cases of *mutual trusts*, *pledges*, and the various kinds of *hiring*, both parties have an interest.

To consider the matter, then, under this triple point of view, beginning with the principle, where the bailment is for the benefit of the bailor, applicable to deposits, and mandates, or commissions without rewards; and, first, of deposits; by which he, who accepts one, is charged with the property of another, without any consideration on

(1) Nareda, 1 Dig. 420. Vrihaspati, and Catyayana, Id. 421. 425. 427. Yajnyawalcya, Id. 422. 430.

(2) Yajnyawalcya, 1 Dig. 407.

(3) Nareda, 1 Dig. 408.

(4) Essay on the Law of Bailments, p. 35.

the part of the owner; while, on that of the depositary, all is trouble, and care. *Subject to any special undertaking*,(1) the law would be unreasonable, that would exact from such a bailee, in point of responsibility, more than the absence of such gross negligence, as must ever be regarded as inconsistent with any kind of engagement. The obligation to *restore* a deposit, is provided for by *Menu;* who requires that, "as the bailment was, "so should be the re-delivery, according to a rule in "the Veda."(2) Or, as it is expressed by another authority, "the very thing bailed must be restored, to the very "man who bailed it, in the very manner in which it was "bailed."(3) According to which, the defence set up by Demosthenes, for a client of his, sued in an action to recover a deposit, must have prevailed at Benares, as we are told it did at Athens;—the action having been brought by two only, out of three who had been concerned in the bailment, Demosthenes insisted (it seems) *that his client could not legally restore the deposit, unless all three proprietors were ready to receive it.*(4) Not controverting this, nor questioning the precision of Vrihaspati, a delivery *substantially* good, would be valid, under a system, that gives effect, upon all occasions, to the *reason* of the law, as opposed to the *letter*, if not carried to excess.(5)—Due caution being inculcated in the selection of a depositary,(6) a deposit is

(1) Jagannatha, 2 Dig. 340.
(2) Menu, ch. VIII. 180. 194, 195. Nareda, 1 Dig. 413.
(3) Vrihaspati, 1 Dig. 415. 2 Id. 139.
(4) Essay on the Law of Bailments, p. 51.
(5) 1 Dig. 419. Vrihaspati, 2 Dig. 128. 153
Yajnyawalcya, 2 Dig. 570, note. 3 Id. 25. 29.
(6) Menu, ch. VIII. 179. 1 Dig. 411.
Essay on the Law of Bailments, p. 46.

one of those things, which, bringing with it nothing but responsibility, a prudent man, in the opinion of Vrihaspati, would not receive; but, if he do receive it, he requires him *to keep it with care*, restoring it on a single demand.(1) Nor is the Hindu law surpassed by any, in the earnestness with which it exacts from every bailee, together with suitable care, the most perfect fidelity, denouncing as criminal, and punishable accordingly, him, who alienes a deposit without permission, uses it without consent, or neglects to preserve it;(2)—insomuch that, as at Rome, so among the Hindus, the violation of one, in some instances, involves infamy.(3) One criterion, exonerating the bailee, is, if, with the goods bailed to him, his own have been lost; in which case, it is held, that the loss is the bailor's, though it should not have happened by any act (as it is called) of God, of the king, or of robbers;(4) the presumption, in all these cases, being against every thing like fault; while the rule is, that he is to make good the deposit, "if in fault, and not unless he be in "fault."(5) But, it does not follow, though none of his own property have been lost, that he is to be necessarily answerable, if the deposit, having been kept with care, be lost notwithstanding; unless it can be shewn, that he have kept his own with very different care; disregarding the

(1) 1 Dig. 416.
(2) Vrihaspati, 1 Dig. 416, 417. 412. 426.
Menu, ch. VIII. 191, 192. 1 Dig. 432, et seq.
(3) Vrihaspati, 4. 1 Dig. 416, 417.
(4) Nareda, 1 Dig. 420.
Vrihaspati and Catyayana, Id. 421. Yajnyawalcya, Id. 422.
Essay on the Law of Bailments, p. 47.
(5) Jagannatha, 1 Dig. 421. Catyayana, Id. 423.

thing deposited, as being another's property, while he secures his own;(1) much more, if he have appropriated any part of it.(2) And here it may be observed, that, where collusion is not imputable, robbery always, by the Hindu law, in opposition to theft, implies a degree of violence, against which no bailee whatever, not specially undertaking, is held to contract; whereas, if a loss happen by thieves, the distinction exists, and a bailee, even without reward, may be chargeable, where such a want of due care can be shewn, as must be taken to have led to spoliation, be it of whatever kind.(3) On the other hand, if the *dépot* that has been resorted to by the owner of the goods, be confessedly an exposed one, of which he has notice, it is his own fault, if he trust it, and they are lost, or injured, by a peril, to which, in the nature of the thing, they would be liable.(4) In the case of a sealed deposit, the Hindu law accords with what (it seems) was considered to be the better opinion, in the contest that existed on the point, among the lawyers of Rome, namely, that the depositary "would only be "obliged to restore the casket as it was delivered, with-"out being responsible for the contents;"(5)—Menu having in like manner declared, that, in such case, "the "bailee shall incur no censure on the *re*-delivery, unless "he have altered the seal, or taken out something."(6)

(1) Vrihaspati, 1 Dig. 429. Id. 421.
Essay on the Law of Bailments, p. 47. 67.
(2) Menu, ch. VIII. 189.—1 Dig. 422.
(3) 1 Dig. 423. 429.
(4) Vrihaspati, 1 Dig. 404. 423.—Catyayana, Id. 421
(5) Essay on the Law of Bailments, p. 39.
(6) Menu, ch. VIII. p. 188.

Though inevitable necessity must, in general, excuse, it will not, if the thing, having been previously demanded, was not restored in time; or if it had been used by the bailee, contrary to the faith of the bailment;—in either of which cases, he so far makes it his own, that the loss, if it happen, becomes his, from whatever cause it have proceeded.(1) Though the heaviest punishment be denounced against him, who, by false pretences, gets into his hands the goods of another,(2) yet is such a proceeding justified, in the case of a creditor, who cannot, by ordinary means, obtain payment of his debts;—as is, also, the retaining, under similar circumstances, what has been regularly deposited.(3)—It is called *legal deceit;* available among a people, with whom, not *deceit* only, but *force* is allowed to be resorted to, whether for the securing of rights, or the discovery of truth.(4)

Between the *depositary*, and the *mandatory*, or him who, without expectation of reward, engages to execute for another a commission of any kind, the difference consists in the diligence, added to the care, for which, to a certain extent, the latter is pledged, according to the subject-matter of the mandate;(5)—insomuch that Grotius considers the *deposit* as a division of the *mandate;* "car " (to use the words of his French translator) le depositaire

(1) Vrihaspati, 1 Dig. 426.—Yajnyawalkya, Id. 430 Nareda, id. 431.
(2) Menu, ch. VIII. 193.—1 Dig. 433
(3) Vrihaspati, 1 Dig. 341.
(4) Menu, ch. VIII 48, 49. 182. 1 Dig. 196. 437.—Vrihaspati, Id. 439, et seq
(5) Essay on the Law of Bailments, p. 23.

" *donne ses soins* à la garde de la chose deposée entre ses " mains;" (1) as the mandatary gives his, in the execution of what is committed to him. Upon the principles of the Hindu law also, the responsibility is the same, in the one case, as in the other, so far as regards care, with the contingencies to which things so bailed may be liable; the benefit, in either case, being exclusively his, to whom the article belongs; (2)—since, in a system, that mixes continually moral dictate, with legislative enactment, it never could be intended to attach legal effect to the position, that " to him who attends cattle as a favour, even " the favour *conferred by him* is his *hire*." (3)

Should it be objected, as hard, in the case of these two sorts of bailees, *receiving nothing*, that they should be responsible eventually for losses, the answer is, that reasonable care, as well as perfect fidelity, are of the essence of the confidence reposed; and, as Jagannatha says, the engagement should not be entered into, " by a person not disposed to an act of duty, or amity." (4)

Vrihaspati (as has been observed) discourages the acceptance of a deposit, as unworthy a prudent man. (5) This is not generous. And, unless his employment of it, as a mean to *deceive heirs*, (6) receive the most favourable construction, such a purpose is far from commendable.—But it belongs to the noble office of the judge, to discountenance and disappoint

(1) L. 1. ch. XII. § 2. Barbeyrac's edit.
(2) Catyayana, 1 Dig. 405, 406. Yajnyawalcya, Id. 407.
(3) 2 Dig. 340.
(4) 1 Dig. 417. 413. Essay on the Law of Bailments, p. 42.
(5) 1 Dig. 416.
Dig. 404. 413. 419.

all *covert* acts, practised to the prejudice of others' rights; nor can Vrihaspati (though said to have been profoundly versed in the law) (1) be ever quoted, with effect, in their support, whether in a Hindu, or in a British Court, administering justice upon Hindu principles; so long as attention shall be paid to the declaration by the highest Hindu authority, that "when the judge discovers a fraudulent pledge, or sale;—a fraudulent gift or acceptance; or, in whatever other case he detects fraud, he is to *annul* the whole transaction." (2)

The next bailment to be considered is that of *loans for use*, in contradistinction to loans of money, or other things, for *consumption*, which are contracts of a different nature; loans for use being for the sole benefit of the bailee, as in those just disposed of, the advantage is entirely on the side of the bailor. Exacting accordingly from the bailee, as the bailment in question does, extraordinary care, he is answerable for slight negligence, though not for inevitable accident or irresistible force. But, if the accident might have been avoided by necessary care, or the force fairly resisted, the borrower must be answerable, if the thing lent to him be lost; much more, if he have exposed it to loss, by his improvidence. (3) So, if it be lost, after the expiration of the period, for which it was borrowed, the loss becomes the borrower's; and he must answer it to the lender with an equivalent, hav-

(1) 2 Dig. 139.
(2) Menu, ch. VIII. 165.
(3) Nareda, 1 Dig. 420. Vrihaspati, Id. 429.
Essay on the Law of Bailments, p. 68.

ing been *in morâ*, as the Romans called it,—the law of deposits applying, in this respect, *a fortiori*, to loans for use. (1) On the other hand, the possession of the borrower is so far commensurate with the object of the loan, that the lender is not to determine it at will, unless some pressing and indispensable purpose of his own would be in danger of failing, if he did not get back, at the moment desired, the thing lent. (2) Like all other bailments, the one in question stipulates for the purest good faith ; and, therefore, where a special use is in the contemplation of the borrower, at the time of borrowing, as if it were his intention to send the thing borrowed into another province, he should disclose it, if he wishes to be safe, (3) the danger to the property lent being eventually increased by such a purpose; as, upon loans for interest, a higher than the legal rate may be exacted, where the borrower is to cross the *Sindhu*, to penetrate dangerous forests, or traverse the ocean: (4)—precautions, that are consistent with the liberal requisition of the law, in the instance in question;—namely, that, in "causes concerning a de-"posit, or a friendly loan for use, the king is to decide "them, without shewing rigour to the depositary;"—against whom, on the contrary, "his honest disposition "being ascertained, the judge is to proceed with mild-"ness." (5)

(1) Catyayana, 1 Dig. 436, 437. 446. Matsya Purana, Id. 445. 2 Dig. 98. Essay on the Law of Bailments, p. 70.
(2) Catyayana, 1 Dig. 438. Essay on the Law of Bailments, p. 67.
(3) 1 Dig. 439.
(4) 1 Dig. 46. 72. 80. Essay on the Law of Bailments, p. 68.
(5) Menu, ch. VIII. 196. 187. Essay on the Law of Bailments, p. 50.

Having discussed those bailments, where the benefit is all *on one side*, the remaining class is that of those where it is *reciprocal*. Such are *mutual trusts*, *pledges*, and the various kinds of *hiring*; of each of which in their order.

Mutual trusts, as referable to the law of bailments, subsist specifically, where reciprocal deposits, loans, or the like, are made between two or more parties; which, whether they be partners in trade, coparceners, or persons no otherwise connected than by the transaction in question, it is plain must be governed by the rules that have been, or are yet to be stated; only with a *reciprocal*, instead of a *single* application.(1)

The law of *pledges* requires a more detailed consideration; the rules concerning them being chiefly deducible from the relative interest resulting from them to the debtor and creditor, as establishing credit on the one hand, and securing payment of a debt on the other. A pledge is an accessory contract, being a bailment of something to the creditor, on a loan of money; which, by the Hindu law, may be for security only, or for security joined with use; and, in this respect, it may be compared with the *Vivum vadium*, and the *mortuum vadium*;—the *living*, and the *mort*-gage, in ours.—But, though this be in general so, and though, to ensure the efficacy of a pledge or mortgage, the Hindu law inculcates the necessity of possession,(2) the authorities to this purpose are not applicable to a sort of mortgage, much in use in Hindustan, and the

(1) Nareda, 1 Dig. 408. Id. 410. Menu, Id. 415. Essay on the Law of Bailments, p. 82.

(2) Vyasa and Vrihaspati, 1 Dig. 205. Append. p. 454.—C.

provinces subject to Bombay, termed *Drishta bandhaca;* by which (according to the usual course of mortgages with us) the pledge is assigned to the creditor as a security without possession, or intention of possession, till the stipulated time arrive;(1) so that it may be doubted, whether this mode of pledging be not originally Hindu instead of Attick, as has been supposed.(2)—In the case of a pledge for use, the debt and interest being extinguished by the use, or otherwise, it reverts to him who made it; on the other hand, any part of the debt remaining, upon expiration of the time for payment, the pledgee, or creditor, may continue to use it, making a demand for payment, and giving notice of his intention to the debtor, or his representative; or, if it be a pledge for *security* only, he may, under the like circumstances, begin to use it, if capable of use, without injury to the substance, giving like notice; while an unjustifiable use of one, being a violation of an implied agreement, works a forfeiture of interest.(3) In either case, he may, by proper application, attach the article, so as to have it sold for his benefit; an account of what is due upon it being previously taken; the excess, if any, upon the sale, to be paid into Court, for the benefit of the owner.(4) And, on this ground it is, that a pledge should, in the judgment of Hindu lawyers, be always taken, where a loan is,

(1) Append. p. 455. 457.—C.

(2) By Sir William Jones. See Essay on the Law of Bailments, p. 84. Catyayana, 1 Dig. 209, et seq.

(3) Menu, ch. VIII. 144. 150. Vishnu, 1 Dig. 135. 144. Yajnyawalcya, Id. 145. 147. Vrihaspati, Id. 149, et seq. Vyasa, Id. 186. Smriti, Id. 197, 198, et seq. Catyayana, Id. 200.

(4) 1 Dig. 197 to 202.

made to a kinsman, or a friend, against whom compulsory payment cannot be so conveniently enforced.(1) So, in the absence of the creditor, and no one on the spot to represent him, the debtor may redeem his pledge, by paying into Court what is due upon it.—By usage, contrary perhaps to the strict letter of the law, a pledge is assignable; but the assignment (which can only be for an equal, or less sum, than the sum advanced upon it) should correspond with the original contract; from which any variation might embarrass the redemption, on the part of the owner, by whom it was first pledged.(2) But a pledge by the owner, of the same thing, at the same time, to two different persons, for the full value to each, is fraudulent and punishable; and, as between the different pledgees, the first hypothecation prevails, subject to priority of possession; or there may be an equitable adjustment of the right, according to circumstances.(3) As effects bailed cannot be legally aliened by the bailee,(4) so is the law justly jealous of such an attempt on the part of the owner of property bailed, while the interest of the bailee in it continues; as in the case of a pledge. It is agreed, that a purchaser, being privy to the article being in mortgage at the time, the transfer would not avail him. It is farther admitted, that it may be restrained by injunction, upon timely application to the Court; and the result of a good deal of dubious discussion on the point is, that to render it valid, in

(1) Vrihaspati, 2 Dig. 69. 1 Id. 18.
(2) Menu, ch. VIII. 143. 1 Dig. 189 to 192. Id. 20.
(3) Catyayana, 1 Dig. 209. Id. 213. Smriti, Id. 213, et seq. Yajnyawalcya, id. 476.
(4) Dacsha, 2 Dig. 210. Id. 152.

favour of the alienee, he should see the thing for which he treats; and not only have reason to be satisfied, that it is unencumbered, but obtain immediate possession; from all which it may be collected, that a clandestine disposal by the owner, to a third person, of a thing already pledged to another for an existing debt, (like the case, with us, of a second irregular mortgage,) can scarcely take effect, unless (contrary to the general policy of the Hindu law) the creditor have improvidently allowed the pledge to remain in the hands of his debtor;(1) conformably with the declaration of Yajnyawalcya, viz. that, in other contested matters, the latest act shall prevail; but that, in the case of a pledge, a gift, or a sale, the prior contract has the greatest force;(2)—as also with the observation of Jagannatha, that, were it otherwise, "no man "would make a loan, apprehending that the debtor would "sell to another, what he had already pledged;"(3)—thus distinguishing between a *pledge*, and a *deposit for safe custody;* which latter, as he remarks, has little comparative force, and may be at any time recalled by the owner.(4)—Prescription runs in other cases; titles being gained by long possession, and lost by silent neglect.(5) But his property in a pledge is never lost to the owner, by any lapse of time, while it remains, as such, out of possession;(6) but, on the contrary, it must be faithfully pre-

(1) 2 Dig. 146.
(2) 1 Dig. 476.
(3) 2 Dig. 147.
(4) 2 Dig. 147, 148.
(5) Menu, ch. VIII. 147, 148. 1 Dig. 214.
Yajnyawalcya, Id. 135. Append.
(6) Menu, ch. VIII. 145. 149. Yajnyawalcya, 1 Dig. 18

served for restitution to him by the creditor; who will be bound to indemnify his debtor, for any damage it may sustain in his hands, through want of due care; the debtor, in the event of loss, not attributable to the creditor, being bound to replace, or make it good: the debt, for which it was given, with the interest running upon it, remaining payable notwithstanding.(1) A slave being pledged,(2) the law protects him, in the hands of the pledgee, from insult; and much more from blows, *struck on a sensible part.*(3)

The last bailment to be considered, as productive of mutual benefit, is that of *hiring*, which is of various sorts, corresponding with others, where the benefit is not mutual, but on one side only. For, as there may be a *loan*, so there may be a *hiring* for *use;* and, as a man may agree to execute a commission gratuitously, so may the like service be undertaken for a reward, or adequate compensation; which is always implied in hiring. And, as a commission either to do something about a thing bailed, or simply to deliver it to another, may be without consideration, (*anwahita,*)(4) in the same manner, a workman, or artist of any description, may hire out his labour or skill; or, he may engage himself for pay, as a *common carrier.* So that the main difference between the bailments that have been already discussed, where the consideration is

(1) See the texts in the Digest, with the Commentary upon them, vol. i. p. 144 to 165.

(2) Ante, ch. VI. p. 139.

(3) Catyayana, 1. Dig. 153. 159.
Lord Holt, as cited in the Essay on the Law of Bailments, p. 76.

(4) 1 Dig. 405. 407.

all on one side, and *hiring*, in its various branches, is, that, in the latter, it is *reciprocal;* the owner of the thing hired, or the hirer of himself, for whatever purpose, being paid, in the one case, for the use of his *property*,—in the other, for that of *himself;* while he who contracts for the particular thing, or service, derives a correspondent benefit from the temporary use of what he so hires. And, upon this reciprocity turns the responsibility, which the bailment in question stipulates. Such being the general principle, it is to be seen how it is applied in the Hindu law.

"Wherever (says Jagannatha) the property of one "person is, for some cause, delivered into the hands of "another, for safe custody, the rules declared in regard "to *deposits* are to be applied: therefore, the law of "bailments (he adds) applies to a carriage, and the like, "*received on hire:* and so, in the case of a person *deli-*"*vered* by the king, or the like, into the hands of a "guardian;" (1)—the meaning of which must be construed to be, that it applies *a fortiori* to the case of hire, which, as it is for the benefit of *both* parties, cannot but be taken to impose a greater responsibility on the bailee, than where the bailment is altogether for the sake, and on account of him, by whom it is made. Nor is Jagannatha singular in appearing "to make no difference in this re-"spect between a keeper of goods for hire, and a simple 'depositary;" the same generality, on the same occasion, occurring in an author of our own; (2) but, that the

(1) 1 Dig. 411.

(2) St. Germain, as cited in Essay on the Law of Bailments, p. 97.

degree is to be estimated by the peculiar nature of the bailment, is sufficiently plain, from the declaration of Nareda, that "whatever (of things *hired* for a time, "at a settled price) be broken or lost, he (the *hirer*) "shall make good, except in the case of *inevitable acci-* "*dent, or irresistible force.*" (1) It may be here noticed, that, if a man build a house, on ground which he has rented, he has a right, on the expiration of his lease, to take with him the thatch, the wood, and the bricks, of which it is constructed, (2) contrary to the maxim of the English law, *cujus est solum, ejus est usque ad cœlum;* from which, modern decisions, proceeding upon equitable principles, have been gradually departing, in favour of lessees for years.

To proceed to that branch of hiring, which consists in the converting of the material bailed, into an article of use;—India has ever been celebrated for its workers in the precious metals, to whom gold or the like being entrusted to make into ornaments, for hire, in proportion to the quality, and the nature of the thing wanted, (3) whether the workman contract for the price of work, or for time, if he fail in performance, he forfeits his hire, though the work want but little of being completed, or the time of being expired; (4) and, as he is bound to be diligent in the execution of what he has undertaken, so is he answerable for reasonable care; that is, for any

(1) Nareda, 2 Dig. 283.
(2) Nareda, 2 Dig. 281, et seq.
(3) 1 Dig. 408. 2 Id. 77.
(4) Menu, ch. VIII. 215, et seq. *Vriddha* Menu, 2 Dig. 275. Matsya Purana, Id. 276

injury to, or loss of, what has been entrusted to him, that can be traced to his fault. (1) So, in the case of a common carrier, he is responsible for a loss, not happening by the act of God, or of the king; to which, for any thing appearing to the contrary, may be added seizure by robbers, the carrier not having led to it, by any indiscretion of his own, much less by any concurrence on his part, direct or implied; (2) in which respect the Hindu differs from other later codes, particularly from the law of England, which makes the carrier liable for a loss by robbers, under whatever circumstances; on the ground of *policy*, lest he should combine with them, for the purpose, without the possibility of detection. (3)

Thus has been discussed the comprehensive, and important contract of bailment, under its various aspects, as recognized by the Hindu law; the bailor, in every case, retaining, in the thing bailed, a reversionary interest, to take effect, as soon as the purpose of the bailment shall have been answered; the bailee being bound to preserve with care, greater or less, according to the nature of the bailment, the thing bailed, while his temporary property, or possession of it continues; as well as to perform about it, with effect, whatever he may have undertaken.

2. The next contract to be considered, according to the order that has been proposed, is that of *loan*, or borrowing, for *consumption*;—whether of money, or other

(1) Vishnu, 2 Dig. 271.
(2) Nareda, 2 Dig. 272. Yajnyawalcya, Id. 274.
Vriddha Menu, Id. 272. Menu, ch. VIII. 408.
(3) Essay on the Law of Bailments, p. 103.

thing, answering the description. (1) It differs from loan for *use*, (which is a bailment,) in that the property of the money, or other thing lent for consumption, vests in the borrower, to be (not returned, but) replaced by him, with an equivalent;—together with such compensation for the loan, as may have been stipulated. The compensation for the loan of money is *interest;* and for performance of the terms of the contract, on the part of the borrower, it is usual to take *security*, consisting in *pledges*, or *sureties*, or both:—of each of which two subjects, namely *interest*, and *security*, in their order.

Though interest upon loans appears to have been always allowed by the Hindu law, yet, prohibited, as it is, as a means of acquisition to the two higher classes of Brahmin, and Cshatrya, the prejudice that existed against it with the Jews, and among other ancient nations, operated, it is plain, with the Hindu legislator; according to whom, "neither a *priest*, nor a *military* man must *receive* interest "on loans; though each of them (he adds) may pay the "small interest permitted by law, on borrowing for some "pious use, to the sinful man who demands it."(2) But, as the Jews, restricted from taking it from one another, were permitted to take it from a stranger,(3) so is it expressly allowed to the *mercantile* class, (the *Vaisya*,) as an unexceptionable mode of subsistence.(4) Appropriate kinds are specified, varying in number with different

(1) Menu, ch. VIII. 151. 1 Dig. 32.
Harita, 1 Dig. 53.
(2) Menu, ch. X 117 1 Dig 134. 2 Id. 137.
(3) Deut. ch. XXIII. 20.
(4) Menu, ch. X. 115, 116. 2 Dig. 135, et seq.

authorities, according as it has been contracted for; (1) which Menu says, ought to be from day to day,(2) though it is most commonly reserved by the month.(3) The longer or shorter period, by which interest is reckoned, concerns the option of repayment, and the avoiding of fractions. A short period being considered to be in the debtor's favour, the creditor is not to stipulate for reckoning it by a longer one. Whatever may be the rate demandable by the *sinful man*, upon a loan for a *pious use*, it has, in general, ever been high in India, according to the risk run, and in the direct order of the classes; a higher rate being demandable, as the class whether of the borrower or lender is inferior;—the lower the tribe, the higher the interest that may be exacted.(4) It varies also according to the existence, or non-existence of a pledge.(5) Involved in apparent contradiction, the subject is considered by Jagannatha to be intricate;(6) nor has his commentary always the effect of elucidating what is obscure, or disentangling what is perplexed. Though the law has prescribed certain rates, as respectively applicable to the different classes, and serving, as they do, to govern cases, in which interest becomes payable, without previous agreement, it is to be collected, that the rules on the subject leave the parties at liberty to disregard them, substituting other terms, where they think

(1) Texts and Commentary, 1 Dig. 49 to 51.
(2) Menu, ch. VIII. 151.
(3) Jagannatha, 1 Dig. 34.
(4) Menu, ch. VIII. 142. 1 Dig. 45. Append. p. 460.—E.
(5) Menu, ch. VIII. 140, et seq. 1 Dig. 29, et seq.
(6) 1 Dig. 53.

proper.(1) Like our own, the Hindu law contemplates cases, where the risk being greater than the specified rate will compensate, a higher may be bargained for, according to the nature of it, whether it be by sea, or by land, answering, in some degree, to our *respondentia;* the consideration, in these cases, being not only the increased risk of non-payment, but the superior profit accruing to the borrower, by the danger to which he and his property are exposed:—in all cases of the sort, the adjustment of the interest is to be settled between the parties, "by men well acquainted with sea "voyages, or journies by land;—with times, and with "places." (2) It has shewn the same consideration, where the contract has taken place in a *foreign country:* the rule being, that, however different, the customary rate prevails, and must be paid.(3) Whatever be the rate, or the reservation of it, all authorities seem to be agreed, that interest, while it continues so, cannot bear interest; and that compound interest cannot be contracted for.(4) At the same time, the debtor being unable to pay the interest reserved, at the time agreed, nothing exists to hinder the parties from renewing the contract, first coming to an account, and turning the interest due into principal; from which date it will, in effect, carry interest.(5) But, it imports the lender not to let interest

(1) Catyayana, 1 Dig. 50. Id. 70, et seq.
(2) Yajnyawalcya, 1 Dig. 46. Id. 80.
Menu, ch. VIII. 157. 1 Dig. 48.
(3) Naroda, 1 Dig. 53. Id. 83. 86. 88.
(4) Menu, ch. VIII. 153. Vrihaspati, 1 Dig. 49.
Nareda, 1 Dig. 50. Yajnyawalcya, id. 51.
(5) Menu, ch. VIII. 154, 155. 1 Dig. 65. 83. Vrihaspati, 2 Dig. 70.

so run in arrear, as to equal the principal, before coming to such an account; since it is also settled, (as with us,) that it never can be allowed to exceed the principal; but must stop there, as it does upon a tender.(1) The position, however, is confined, generally, to loans of *money*;—not extending to *grain*, and other things, of which loans may be made, not involving the notion of *usury*. Of those, the amount of interest, running on, is not limited to the principal.(2) On the other hand, many things are enumerated, that, in their nature, bear no interest; as a debt contracted at play; a sum due on account of suretyship; an unliquidated demand, and others; though, upon any of them, it may be reserved by agreement.(3)

To proceed to the subject of *sureties*, that of *pledges* having been already discussed.(4) In the adoption of sureties, a variety of persons are enumerated, who (it is said) should never be accepted as such. The exceptions involve either some inconsistency with prior engagements, or some incompatibility with subsisting connexions; if not an evident risk of the object failing, from the character, or description of the person proposed, in the event of his being selected, as the intended surety.(5) In a system, however, like that of the Hindus, not re-

(1) Yajnyawalcya and Vishnu, 1 Dig. 133. Gautama, id. 138. Append. p.

(2) Menu, ch. VIII. 151, and Texts from lxii. to lxx. with the Commentary, 1 Dig. 112 to 123.

(3) Texts lxxi. to lxxv. with the Commentary upon them, 1 Dig. 124 to 133.

(4) Ante, p. 287.

(5) Catyayana, 1 Dig. 226.

stricted to positive ordinance, they may be considered perhaps, for the most part, as affording matter of prudential caution, rather than of legal disqualification;—though the rejection of one undivided brother, as a surety for another, respecting a common interest, would indeed be consonant to the strictest law, as has appeared in the chapter on parceners.(1) Sureties are for appearance, for the honesty of the debtor, or for payment;(2) and bail in an action may be taken from the plaintiff, as well as from the defendant.—Sureties for *payment* are bound for delivery to the creditor of effects pledged by the debtor;(3) as suretyship for *appearance*, includes also that for *ordeal*,(4) (a mode of trial not available in our courts,) so that, if the debtor, liable to ordeal, be not forthcoming, the surety must pay the debt: and, where it is for appearance generally, the production of the debtor, at the time and place agreed, subject to insuperable impediments, must be *bonâ fide*, so that he may be amenable to payment;(5) the law being indulgent with respect to the time allowed for producing him, where he has absconded; as well as, in every case, with respect to the obligation of the surety to pay, where it has become absolute, by the failure of the principal.(6) The surety for *honesty* is answerable, if, by confidence in his repre-

(1) Ante, ch. VII. p. 205.
(2) Vrihaspati, 1 Dig. 233. Nareda, Id. 237. Yajnyawalcya and Catyayana, Id. 239.
(3) 1 Dig. 246.
(4) 1 Dig. 240. Ante, p. 207.
(5) 1 Dig. 243.
(6) 1 Dig. 244.

sentations, the creditor has been misled;(1) involving a question of responsibility, that occupied, not long since, a good deal of attention in Westminster Hall; upon which the opinions of the Judges of England were divided. Between suretyship for payment, and the other two kinds, there is this difference, that, in the two latter cases, the surety dying, and the principal neglecting to pay, the sons of the surety are not answerable, unless their father was himself indemnified; and then the son is liable; as he is, in all cases, subject always to assets, and without interest, where the undertaking was for *payment*.(2) Of sureties, jointly bound, each is answerable for his proportion only of the debt to be paid, unless it shall have been otherwise agreed.(3) The surety, having paid, has his claim over against his principal, for repayment; the measure of which varies, according to circumstances, and according to the nature of the commodity, as distinct from money, for the return of which the principal has contracted.(4)

In all cases of loans, not only is it urged to take either a pledge, or a surety;(5) but the acknowledgment of the surety, and the agreement for the loan, are also recommended to be in writing: of which forms are given in the Digest.(6)—Good rules! but not indispensable;—

(1) 2 Dig. 235.
(2) Menu, ch. VIII. 160. 162. Yajnyawalcya, 1 Dig. 247. Catyayana, id. 248. 255. Append. p. 463, 464.—C.
(3) 1 Dig. 257.
(4) 1 Dig. 258 to 262.
(5) Vrihaspati, 1 Dig. 19. Nareda, Id. 27.
(6) 1 Dig. 21 to 28. Id. p. 241.

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since, infringing them, " if (says Jagannatha) a man de-
" liver a loan, without either pledge or writing, he vio-
" lates no duty; and the debt being any how proved, the
" debtor shall be compelled by the king to repay it to his
" creditor."(1) *Trade*, and *money lending*, though the proper business of the (*Vaisya*, or) *mercantile* class,(2) are permitted even to the Brahmin, and the Cshatrya, if unable to subsist by more appropriate means.(3)

3. The subject of money-lending, or the contract of *borrowing*, having been discussed, the next for consideration is, that of *purchase* and *sale*, or of *exchange;*— barter being, in effect, a sale, and subject to the same rules; the difference consisting only in the distinction between a *price*, which is applicable to a *sale*, and an *equivalent*, which is applicable to *exchange;* as remarked by Jagannatha.(4)

Sale, then, is constituted by payment of the price, and delivery of the article, according to agreement. On goods sold and delivered, but not paid for on demand, interest accrues after six months from the sale; as it does on the price paid, where the article has been kept back;(5) unless " there have been a special agreement, as to the times of " delivery and payment."(6) A thing sold, and not delivered, (subject to any special agreement,) is at the risk of the vendor; so that, if, while it remains unduly in his

(1) 1 Dig. 27.
(2) Menu, ch. VIII. 410. 1 Dig. 12.—Ante, p. 16,—Post, p. 308.
(3) Vrihaspati, 1 Dig. 14. Post, p. 308.
(4) 2 Dig. 336.
(5) Catyayana, 1 Dig. 101.
(6) Nareda, 2 Dig. 319.

hands, its value sink, he must make it good, with an attention to the eventual profit, where it was purchased for exportation; the same obligation attaching, by whatever means it may be lost.(1) Where the price has not been stipulated, the law implies a reasonable one, *(quantum valebat;)* to be settled, in case of dispute, by merchants.(2) If, instead of paying down the price, *earnest* be paid, and the buyer afterwards break the agreement, the earnest is forfeited; and if, in such case, the seller break it, he is liable to repay the earnest twofold.(3) Where the matter rests on the original agreement, and the vendee, upon its being tendered, refuse to accept the commodity he has bought, there is, with regard to him, an end of the contract; and the owner may dispose of the article as he pleases, the vendee being responsible for any loss, resulting from his not having completed his purchase.(4) One of the most important considerations in every sale, is the security of the vendee, not only as to the right of the vendor to sell, but as to the thing sold proving what it was represented to be, according to the fair understanding of the buyer. And, upon these two points, as upon so many others, relating to contracts, there is a striking analogy between the Hindu law and our own. With regard to the first, the general principle is, that a *sale without ownership* in the vendor, being void, there is no safety for a purchaser but in *market overt.* Market overt, as opposed to all

(1) Nareda, 2 Dig. 318, 319. Yajnyawalcya, id. 319.
(2) Nareda, 2 Dig. 329.
(3) Yajnyawalcya and Vyasa, 2 Dig. 327. Id. 1. 205.
(4) Nareda, 2 Dig. 327. Yajnyawalcya, id. 304.

traffic with suspicious characters in secret places, at improper times, or for unfair prices, as circumstances indicating fraud,(1) is, in strictness, that which is carried on before the king's officers; where, by means of a proper entry, the seller may be known, and got at;(2)—the establishment of *markets* and *fairs*, with the regulations of *weights* and *measures*, as well as the rights of *pre-empti* and *embargo*, having belonged to the prerogative in India, ever since the days of Menu.(3) But, it is said, that *market* is mentioned as an instance only; and that the requisition of the law is satisfied, by a purchase made openly in the presence of respectable persons.(4) The purchase having been so far unexceptionable on the part of the purchaser, it remains for him still, if questioned, to produce the seller, for which time is to be given;(5) who, being produced, the owner recovers his property, and the buyer receives back his price.(6) The seller not being to be found, the owner is entitled to get back his property, paying the buyer one-half what he paid for it; presuming the purchase on his part to have been fair.(7) And, if not having been made in market overt, the buyer cannot produce the seller, he is liable to relinquish the goods so bought to the owner, on proof by the latter of his pro-

(1) Yajnyawalcya, 1 Dig. 489. Vrihaspati, Id. 511. Nareda, Id. 512. 2 Id. 14.
(2) 1 Dig. 488, 489. 2 Id. 145.
(3) Menu, ch. VIII. 401. 403. 399.
(4) 1 Dig. 489.
(5) Catyayana, 1 Dig. 484.
(6) Menu, ch. VIII. 201, 202. 1 Dig. 502. 487, et seq. Marichi, 1 Dig. 510.
(7) The same authorities.

perty;(1)—a sale under these circumstances being regarded as void. The equity of the Hindu rule, where the loss is divided, consists in the supposition of the owner having been in some fault; since otherwise, it is imagined, he could not so have lost his property;—an inference that is made by the law, even where he had been *robbed* of it;(2) for which supposed fault, he forfeits half its value, as the price of getting it back, under the special circumstances; while the purchaser eventually loses half what he gave for it, as a punishment for buying from one, whom he cannot afterwards produce.(3) Not unlike the regulation, among the ancient Visigoths, noticed by Sir William Jones; according to which, "if precious things were deposited, and "stolen, time was given to search for the thief; and, if he "could not be found within the time limited, a *moiety* of "the value was to be paid by the depositary to the "owner, *ut damnum ex medio uterque sustineret.*"(4) Such is the difference, by the Hindu law, between a *public* and a *private* sale;(5) each implying a warranty, in respect to the title of the vendor; as was the case by the civil law, and is by our own.

With respect to the *second* point, regarding the *integrity* of the article purchased, forming one of the eighteen titles of Hindu law, under the head of "*rescission of purchase and sale;*"(6) here also, the law expects that a thing be,

(1) Chandeswara, 1 Dig. 484.
(2) 1 Dig. 129, 130.
(3) Vrihaspati, 1 Dig. 509. Nareda, Id. 505. Id. 508. Vishnu, Id. 510.
(4) Essay on the Law of Bailments, p. 113.
(5) 1 Dig. 484.
(6) Menu, ch. VIII. 222. 2 Dig. 307.

what it is represented to be.(1) But, in general, it is the buyer's own fault, says Jagannatha, if he examine not the commodity;(2) and it is his duty, "to know what may be "the loss on each article, and what the gain."(3) Therefore, it is not sufficient, that the price of an article have been high, to subject the seller, on this account, to have it thrown back upon his hands; it must, for this purpose, have been *excessive*.(4) Of *marketable* things, the prices are, as they may have been settled by authority for the market;(5) any combination to defeat which is punishable with the highest amercement,(6)—being a thousand *panas*.(7) If the desire to rescind the contract arise from the discovery of a blemish, or defect in the article, *unknown to both parties at the time*, it may be returned, within the period limited for the purpose; different periods being allowed for examination, or trial, according to its nature, as it is more or less perishable. If fraudulently sold, with a concealed blemish, it may be returned at any time.(8) And fines are declared, against those who falsify, or *cheat* in weights, or measures; who *adulterate* drugs or other things, with improper mixtures, for the purpose of sale; or who *disguise* one thing for another, counterfeiting "the skin of a tiger, by colouring the skin of a cat;

(1) Menu, ch. VIII. 203. 1 Dig. 514. 2 Id. 316.
(2) 2 Dig. 321. Ante, p. 131.
(3) Nareda, 2 Dig. 313.
(4) 2 Dig. 312, et seq.
(5) Menu, ch. VIII. 402. Yajnyawalcya, 2 Dig. 333, et seq.
(6) Yajnyawalcya, 2 Dig. 332, 333.
(7) Menu, ch. VIII. 138.
(8) 2 Dig. 316.—Id. 309, et seq. 314, et seq.
Nareda and Vrihaspati, 2 Dig. 325.

"or a ruby, by tinging a glass bead with another hue;" for which the penalty is eight times the amount of the sale.(1)

4. The remaining contract, to be adverted to, is that of *debt*, (*Rinadan*,) constituting the first of eighteen titles, enumerated by Menu;(2) reserved for mention here the last, as being involved in, and, for the most part, the result of, other contracts, already detailed, rather than a substantive and independent one; respecting which, most that occurs among the only authorities referred to, as such, in this work, has been anticipated, either in the preliminary observations upon contracts in general, referring, among other things, to the circumstances, under which particular persons are, or are not, capable of contracting debt, (3) with the considerations that are excluded, as unlawful;(4) or in the chapter of "Charges on the Inheritance," shewing, how far the obligation of payment attaches, upon the death of a debtor, on his representative; as also the order in which it is to be made, where there is a deficiency of assets;(5) or, lastly, in discussing the two accessory contracts of pledges,(6) and sureties,(7) with the subject of interest.(8) Among the provisions applicable to the subject, is to be noticed the period, within which actions must be brought; being, for the recovery of debt,

(1) Yajnyawalcya, 2 Dig. 329, et seq.
(2) Menu, ch. VIII. 4. 139.
(3) Ante, p. 270.
(4) Ante, p. 278.
(5) Ante, p. 226.
(6) Ante, p. 287.
(7) Ante, p. 298.
(8) Ante, p. 295.

or other personal matters, ten years.(1) Nor is a suit the only mode of enforcing it; the text of Menu, cited in the Mitacshara, authorizing the recovery of a man's property, "by the aid of laws, divine or human; by stratagem; by the "practice of *acharitum;* and even by force:"(2)—by *acharitum*, being meant that remarkable one of sitting *dherna* at the door of the debtor, abstaining from food; till, by the fear of the creditor dying at his door, compliance, on the part of the debtor, is exacted;—an alarming species of importunity, prohibited in the Bengal provinces, by one of the Bengal Regulations; the preamble to which, drawn up by the late Mr. Duncan, while president at Benares, gives an interesting description of this extraordinary proceeding;(3) existing in practice probably, rather than warranted in law; if it be true, that, in a Hindu court, such a settlement would not be pleadable to an action by the creditor, against the same debtor, for the same cause; on the ground, that the debtor should have resisted such a mode of enforcing payment, making his creditor amenable for the attempt.(4) In case of a suit, both arrest and bail are competent; not, however, without consideration of the character of the defendant, as to trust-worthiness.(5) If, upon the trial, the plaintiff be convicted of having preferred a false claim, or the defendant of having set up a false defence, either party is liable to be amerced, in twice the amount of the sum in dispute, having done it know-

(1) Vrihaspati, 1 Dig. 185. Append. p. 465.
(2) Bebustah of Hindu officers; Beng. Rep. 1808. p. 175.
Menu, ch. VIII. 48, 49, 50. 176. 1 Dig. p. 337.—Ante, ch. VI.
(3) Vrihaspati, 1 Dig. 339. 354.—Asiat. Reg. vol. p.
(4) Ellis in MSS. penes me; and see Menu, ch. VIII. 168.
(5) Catyayana, 1 Dig. 346.

ingly :(1) and, under any circumstances, the parties are subject to a tax, toward defraying the charges of judicature.(2) The creditor being of equal or superior class with his debtor, an arrangement may be made for working out the debt;(3) the work stipulated being consonant to the class of the debtor, and not excessive; if it be, he will be entitled to his release.(4) Should he be incapable of labour, time must be given him for payment.(5) Such is the course, where a defendant has no effects to satisfy a judgment; in which case, a Brahmin can only be compelled to pay according to his income, "by little and little."(6) But, in this, and every case of exemption in favour of the Brahmin, one of the sacerdotal class is intended; all being born capable of that class, but few, comparatively speaking, belonging to it; the rest being secular Brahmins, pursuing various worldly pursuits permitted to them by the law.(7) The sacerdotal, learned Brahmin, has indeed various exemptions, extending to capital punishment; but their number has probably, in all time, rendered their claim an evil of no greater importance, than what results in other communities from the tolerance of privileged orders; and certainly not greater than what existed under our own law, while benefit of clergy was in full force.

The above particulars, treated at sufficient length, by

(1) Menu, ch. VIII. 59. Yajnyawalcya, 1 Dig. 367. Append. p. 412.
(2) Yajnyawalcya, 1 Dig. 372. Vishnu, Id. 374.
(3) Menu, ch. VIII. 177. Id. IX. 229.
(4) Catyayana, 1 Dig. 352.
(5) Nareda, with the Commentary, 1 Dig. 353.
(6) Menu, ch. VIII. 177.
Yajnyawalcya, and Commentary, 1 Dig. 351. 385.
Jagannatha, 1 Dig. 354.
(7) Ante, p. 98. 301.

Hindu writers, on the title under consideration, it would be impertinent to dwell upon here; the King's Charters, and Company's Regulations having settled the means, by which matters in dispute between Hindus are to be pursued, in British courts of justice. For the like reason, the law of *pleading*,(1) and of *evidence*, is passed over, though entering (particularly the latter) into Hindu, as well as European treatises, on the subject of contracts. But these parts of their law, also, not having been, by the Royal Charters, reserved to the Natives,(2) sufficient be it to observe, that Hindu pleading was noticed with commendation by Sir William Jones;(3) and that, with some trifling exceptions, the Hindu doctrine of evidence is, for the most part, distinguished nearly as much as our own, by the excellent sense that determines the competency, and designates the choice of witnesses, with the manner of examining, and the credit to be given them; as well as by the solemn earnestness, with which the obligation of truth is urged, and inculcated; insomuch that less cannot be said of this part of their law, than that it will be read by every English lawyer with a mixture of admiration and delight, as it may be studied by him to advantage.(4) Even the *pious perjury*, which it has been supposed to sanction,(5) being resolvable,

(1) Menu, ch. VIII. Vyasa, 1 Dig. 369. Nareda, Id. 370.

(2) See case of Syed Alley v. Syed Kulleo Mulla Khan (1813); Notes of Cases at Madras, vol. ii. p. 189.

(3) See Preface to Dig. p. xii.

(4) Menu, ch. VIII. from v. 13, to v. 122.
Yajnyawalcya, 1 Dig. 393, et seq. Append. from p. 466 to 474.

(5) Menu, ch. VIII. v. 103, 104. Pref. to same, p. xviii.
See Hedaya, vol. ii. b. xxi. p. 666. Aul. Gell. lib. i. ch. III.

after all, into no greater liberty, than what our juries (not indeed with perfect approbation) have long been allowed to take, where the life of a prisoner, on trial before them, is sometimes at stake,—credit is to be given to the pregnant brevity of the Hindu oath; viz. "What ye know to have "been transacted in the matter before us, between the "parties reciprocally, declare at large, and with truth;"(1) as also to the noble warning, with which the subject, as detailed by Menu, is ushered in, that, "either the Court "must not be entered by judges, parties, and witnesses, "or *law* and *truth* must be openly declared."(2) Nor, recurring to the code that has been under consideration, so far as Britain is concerned in administering it, does aught, for the present, appear to remain, but to repeat the hope, that it may adhere to the policy, which dictated to its legislature the *Acts*, preserving to the Hindus its *essentials*;—a policy, which it employed the powerful energies of one great man,(3) exerted in the service, and for the benefit of his country, anxiously to establish and maintain; as it did those of a distinguished ornament to his profession, exercising in their behalf, both *on*, and *off* the *seat of justice*, his elegant and varied faculties, to illustrate and promote;(4)—a *code*, which liberal minds, making allowance for ancient superstitions, and respecting, with indulgence, primeval usages, will be unwilling to disdain, revered, (as it has been remarked to be,(5)) "as the word of the

(1) Menu, ch. VIII. 80.
(2) Menu, ch. VIII. 13.
(3) The late Lord Viscount Melville.
(4) The late Sir William Jones.
(5) Preface to translation of Menu, p. xix.

"Most High!"—just as we, upon evidence deemed by us to be sufficient, believe the Decalogue to have been so delivered, at an early period, to the Jews; while eminent persons among us have thought, (in common with the Hindus,) that *letters themselves*, so far from being of human invention, were an immediate gift from "the beneficent Cre-"ator."(1) For the system in question, we see plainly, that it is too much a mixture of "despotism and priestcraft,"(2) to have had the origin ascribed to it. But let us not, with unbecoming self-sufficiency, be too severe upon human error; unable, as we are, to estimate its source, or judge of its associations. Rather let us, with characteristic generosity, toward a people that deserve well of us, (doing, moreover, by them, as we would be done by,) endeavour to preserve to them, inviolate, at least its most useful portions;—in which hope and confidence, the present essay was begun, and has been finished;—a work, long contemplated, and by many often desired; condensing, with probable, if not with perfect accuracy, within the shortest practicable compass, the principal doctrines of the Hindu law, referable to subjects of special interest, as of the most frequent occurrence;—in the course of which have been adjusted, and applied, the ancient authorities, compared with the opinions of the living; not without attention to the conflicting tenets of different schools; with occasional reference, for the sake of illustration, to other codes, and especially to our own;—the fruit finally, of independant leisure, earned by near twenty

(1) Menu, cited in 1 Dig. 24.

(2) Preface to translation of Menu, p. xvii.

years' assiduous administration of justice, among the people whom it concerns. Having accomplished so much, towards rescuing parts of their law from the confusion in which it lies, and the uncertainty that has been thought to characterize it, despondence, as to how the attempt may be received, ought not perhaps to be entertained. At least, a consciousness, as well with regard to the design, as to the care employed in its execution, cannot fail to afford a reward, consonant to such an undertaking; namely, an inward satisfaction, that will, no doubt, be vastly enhanced, should it prove of the use intended;—thereby virtually contributing to the contentment, and thence to the attachment of our Hindu subjects, *confessedly partial to their own institutions;* and thus warranting its author in ascribing to his connexion with India, in some small degree, the noble self-congratulation, to which the Athenian youth were, with reference to their country, by their early devotions, taught to aspire—Τὴν πατρίδα οὐκ ἔλαττω παραδώσω, πλείω δὲ καὶ ἀρείω.(1)

(1) Patriam liberis non relinquam in deteriore, sed potius in meliore, statu. Petit. Leq. Attic. p. 12. 231.

A.

Account by H. T. Colebrooke, Esq. of the Hindu Schools of Law.

THE laws of the Hindus, civil and religious, are by them believed to be alike founded on revelation, a portion of which has been preserved in the very words revealed, and constitutes the Vedas, esteemed by them as sacred writ. Another portion has been preserved by inspired writers, who had revelation present to their memory, and who have recorded holy precepts, for which a divine sanction is to be presumed. This is termed *Smriti*, recollection, (remembered law,) in contradistinction to *Sruti*, audition, (revealed law.)

The Vedas concern chiefly religion, and contain few passages directly applicable to jurisprudence. The law, civil and criminal, is to be found in the Smriti, otherwise termed Dharma Sastra, inculcating *duty*, or means of *moral merit*. So much of this, as relates to religious observances, may be classed, together with ancient and modern rituals, (bearing the designation of *Calpa*, or *Paddhati*,) as a separate branch; and forensic law is more particularly understood when the *Dharma Sastra* is treated of.

That law is to be sought primarily in the institutes, or collections *(sanhitas)* attributed to holy sages: the true authors, whoever these were, having affixed to their compositions the names of sacred personages: such as Menu, Yajnyawalcya, Vishnu, Parasara, Gautama, &c. They are

implicitly received by Hindus, as authentic works of those personages. Their number is great: the sages reputed to be the authors being numerous; (according to one list, eighteen; according to another, twice as many; according to a third, many more;) and several works being ascribed to the same author: his greater or less institutes, (*Vrĭhat*, or *Caghu*,) or a later work of the author, when old, (*Vrĭddha*.)

The written law, whether it be *sruti* or *smrĭti*, direct revelation, or traditional, is subject to the same rules of interpretation. Those rules are collected in the *Mímánsá*, which is a disquisition on proof and authority of precepts. It is considered as a branch of philosophy; and is properly the logic of the law.

In the eastern part of India, viz. Bengal and Bahar, where the Vedas are less read, and the *Mímánsá* less studied than in the south, the dialectic philosophy, or *Nyáya*, is more consulted, and is there relied on for rules of reasoning and interpretation upon questions of law, as well as upon metaphysical topics.

Hence have arisen two principal sects or schools, which, construing the same text variously, deduce upon some important points of law different inferences from the same maxims of law. They are subdivided, by farther diversity of doctrine, into several more schools or sects of jurisprudence, which, having adopted for their chief guide a favourite author, have given currency to his doctrine in

particular countries, or among distinct Hindu nations: for the whole Hindu people comprise divers tongues; and the manners and opinions, prevalent among them, differ not less than their language.

The school of Benares, the prevailing one in middle India, is chiefly governed by the authority of the *Mitácsharâ* of *Vijnyánéswara*, a commentary on the institutes of *Yájnyawalcya*. It is implicitly followed in the city and province of Benares: so much so, that the ordinary phraseology of references for law opinions of Pandits, from the native judges of courts established there, previous to the institution of Adawluts superintended by English judges and magistrates, required the Pandit, to whom the reference was addressed, "to consult the Mitácsharâ," and report the exposition of the law there found, applicable to the case propounded.

A host of writers might be named, belonging to this school, who expound, illustrate, and defend the *Mitácsharâ's* interpretation of the law. It may be sufficient to indicate in this place, the *Víramitródaya* of *Mitra Misra*, and the *Viváda tándava*, and other works of *Camalácara*. They do not, so far as is at present recollected, dissent upon any material question from their great master.

The *Mitácsharâ* retains much authority likewise in the south and in the west of India. But to that are added, in the peninsula, the *Smṛiti Chandricâ* and other works bearing a similar title, (as *Dattaca Chandricâ*, &c., com-

piled by *Dévana Bhatta*, together with the works of *Mádhava Acharya*, and especially the Commentary on *Párásara*, and likewise the writings of *Nanda Pandita*, including his *Vaijàyanti*, and *Dattaca Mímánsá;* and also some writers of less note.

In the west of India, and particularly among the Marahattas, the greatest authority, after the *Mitácsharà*, is *Nílacant'ha*, author of the *Vyavahára Mayúc'ha*, and of other treatises bearing a similar title.

In the east of India, the *Mitácsharà*, though not absolutely discarded, is of less authority, having given place to others, which are there preferably followed. In North Bahár, or *Mithilá*, the writings of numerous authors, natives of that province, prevail; and their doctrine, sanctioned by the authority of the paramount Raja of the country, is known as that of the Maithila school. The most conspicuous works are the *Viváda Retnácara*, and other compilations under the superintendance of *Chandéswara;* the *Viváda Chintámani*, with other treatises by *Váchespati Misra;* and the *Viváda Chandra*, with a few more.

To these are added, in Bengal, the works of *Jimúta Váhana*, and those of *Raghunandana*, and several others, constituting a distinct school of law, which deviates on many questions from that of *Mithilá*, and still more from those of Benares, and the *Dekhin*, or southern peninsula.

Note by Mr. C.

An anonymous author, in a publication entitled, " Ob- " servations upon the Law and Constitution of India," (1) has adverted to my use of the term *school* in the sense in which it is here employed; and has observed, that I talk " of the Bengal school, and the Benares school holding " different laws, as if the question were of taste, or of the " fine arts."

I am yet to learn why schools are to be restricted to matters of taste and the fine arts; or why jurisprudence is not to be taught and studied in schools. Nor am I aware that any more appropriate term can be chosen, when speaking of diversity of doctrine, deduced by a varied train of reasoning and interpretation, from the same premises.

I may remark, as I pass, that the anonymous author has misquoted me. I am not " found talking of schools hold- " ing different *laws*," but different *doctrine*, and different *opinions*.

When the author, in the same paragraph, affirmed that " uniformity in the law of succession is generally " found in the same state," he had forgotten that the law is not the same in North and South Britain; and perhaps he had never heard of gavelkind and borough English,

(1) P. 240.

nor of customs of the city of London, and of the county of York; much less can he have been apprized, that, but a few years ago, almost every province of France, every *Pays Coutumier* in that kingdom, had peculiar laws in relation to succession.

When he censured the Hindus for want of uniformity in their laws, he overlooked, among his favourite Mahomedans, the discordance of sects, and discrepancy of doctrine.

Can he be ignorant, too, that the Hindu name comprises various nations, differing in language and in manners, as much as the various nations of Christian Europe? It is no more to be wondered, that law should be different in Bengal and Benares, than that it is so in Germany and Spain.

H. T. C.

B.

BY H. T. COLEBROOKE, ESQ.

Extracted from Mr. Tucker's Financial Statement, 1824. (*p.* 238.)

As very incorrect notions appear to have been entertained concerning the nature of the "*Panchâyeti*," prevailing from ancient times in India, it is expedient to consult the writings of the Hindus themselves, who in treating of the administration of justice, have occasion to advert to the subject. The following is a brief summary from very ample disquisitions, contained in Treatises of Hindu Law.

An assembly for the administration of justice is of various sorts: either stationary, being held in the town or village; or moveable, being held in field or forest; or it is a tribunal, superintended by the chief judge appointed by the sovereign, and intrusted with the Royal Seal, to empower him to summon parties; or, it is a Court held before the Sovereign in person. The two first of these, are constituted at the request of parties, who solicit cognizance and determination of their differences; they are not established by operation of law, or by the act of the King, but by voluntary consent. The two last are Courts of Judicature, established by the Sovereign's authority: such a Court is resorted to for relief, as occasions occur; and not as the first mentioned, constituted merely for the particular purpose.

To accommodate or determine a dispute between contending parties; the heads of the family, or the chiefs of the Society, or the inhabitants of the town or village, select a referee approved by both parties.

Among persons who roam the forest, an assembly for terminating litigation, is to be held in the wilderness; among those who belong to an army, in the camp; and among merchants and artisans, in their societies.

Places of resort for redress, are, 1st. The Court of the Sovereign, who is assisted by learned Brahmins, as Assessors. It is ambulatory, being held where the King abides or sojourns.

2nd. The tribunal of the Chief Judge ("*Prádvivàca*," or, "*Dharmàdhyacsha*") appointed by the Sovereign, and sitting with three or more assessors. This is a stationary Court, being held at an appointed place.

3rd. Inferior Judges, appointed by the Sovereign's authority, for local jurisdictions. From their decisions, an appeal lies to the Court of the Chief Judge, and thence to the Raja, or King, in person.

The gradations in arbitration, are also three.

1st. Assemblies of townsmen, or meetings of persons belonging to various tribes, and following different professions, but inhabiting the same place.

2nd. Companies of traders or artisans: conventions of persons belonging to different tribes, but subsisting by the practice of the same profession.

3rd. Meetings of kinsmen, or assemblages of relations, connected by consanguinity.

The technical terms in the Hindu, for these three gradations of assemblies are, 1st, *Puga;* 2nd, *Srénì;* 3rd, *Cula.*

Their decisions or awards are subject to revision: an unsatisfactory determination of the "*Culạ*," or family, is revised by the "*Srénì*," or company, as less liable to suspicion of partiality, than the kindred; and an unsatisfactory decision of fellow-artisans, is revised by the "*Puga*," or assembly of cohabitants, who are still less to be suspected of partiality. From the award of the "*Puga*," or assembly, an appeal lies, according to institutes of Hindu Law, to the tribunal of the "*Prádviváca*," or Judge; and, finally, to the Court of the *Ṛaja*, or Sovereign Prince.

The "*Puga*," "*Srénì*," and "*Cula*," are different degrees of "*Panchâyeti;*" which, as is apparent, is not in the nature either of a jury, or of a rustic tribunal; but merely a system of arbitration, subordinate to regularly constituted tribunals, or Courts of Justice.

It was not the design of the Bengal regulations to abrogate the "*Panchâyeti*," or to discourage arbitration.

The judicial regulations of 1772, provided that, " in all cases of disputed accounts, &c., it shall be recommended to the parties, to submit the decision of their cause to arbitration; the award of which shall become a decree of the Court. Every encouragement is to be afforded to persons of character and credit, to become arbitrators; but no coercive means to be employed for that purpose."

This provision, in nearly the same words, of which the above is an extract, occurs in the regulations passed in 1780.

It is repeated in the regulations of 1781, with this addition, that " the Judge do recommend, and as far as he can, without compulsion, prevail upon the parties to submit to the arbitration of one person, to be mutually agreed upon by the parties;" and, with this farther provision, that no award of any arbitrator or arbitrators, be set aside, except on full proof, made by oath, of two credible witnesses, that the arbitrators had been guilty of gross corruption, or partiality, in the cause in which they had made their award.

Here we find the first deviation from the spirit of Hindu arbitration: the regulations of 1781 were drawn up by Sir E. Impey, and that deviation, which was intended to render arbitration more effectual, has, in its consequences, overset the system. Every dissatisfied party, unable to impeach the award of an arbitrator

without proving partiality or corruption, set about calumniating the arbitrator; and imputed corruption to him simply, that he might obtain a revision of the award, which, in the Hindu system, he might have obtained in regular course of appeal, without any such imputation. As the practice grew, all respectable persons declined references, lest they should be calumniated by the discontented litigant; and "*Panchâyeti*" has fallen into disuse.

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RESPONSA PRUDENTUM;

OR,

OPINIONS OF PANDITS

ATTACHED TO THE COURTS ESTABLISHED THROUGHOUT THE INTERIOR OF

THE TERRITORIES DEPENDANT UPON THE GOVERNMENT OF

Madras:

WITH OTHER ORIGINAL PAPERS,

AS

PREPARED AND ARRANGED FOR THE PRECEDING WORK

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IN TWO VOLUMES.
VOL. II.

Mirabile est, cum plurimum in faciendo interait, inter doctum et rudem, quam non multum in *judicando*.—Cic. de Orator. iii. 24.

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NOTE.

The initials C. E. and S. annexed to the "Remarks," in the following Appendix, denote respectively the names of Mr. Colebrooke, the late Mr. Ellis of Madras, and Mr. Sutherland of Bengal.

ELEMENTS

OF

HINDU LAW

APPENDIX TO CHAP. I.

ZILLA OF VERDACHALLUM.

March 14, 1810.

Teroovandeporam Chrishnamachariar,
By his Vakeel, Seshadru Jyengar,
v.
Alamalamman,
By his Vakeel, Syed Kussanooden Cawn.

We send you copy of the genealogical table in this cause; and you will let us know which of the parties is to be considered as heir. If the proprietor of a property authorize another to take possession of it, and perform his funeral ceremonies after his death, and die, leaving an heir at law, is the latter thereby disinherited?

Answer of the Pundit.

The gift by the owner in his lifetime was competent; and takes effect upon his death.

Remarks.

This is a consequence of the power of *giving;* which is not restrained, unless in the case of land, the owner having male issue living; or in that of the whole property, leaving the family thereby destitute. Jagannatha's Digest, book ii. ch. iv. ver. 4, 5. 7. 9. 14. 18. According to the Smriti-Sara, cited by Jagannatha, (vol. ii. p. 118.) a gift of the whole estate is valid, but sinful. In the case of land, however, the gift would be invalid, if the heir were a lineal male descendant, and did not consent. Mit. on Inh. ch. 1. sect. 1. § 27. C.

ZILLA OF CAMRA.

May 3, 1810.

1. If a patrimonial estate in land be to be disposed of, as *danum*, or gift to any one, can the whole of it be so parted with, without the consent of the wife of the donor, or reservation to her of any share?

2. Will the conveyance be good, by way of assignment in trust, in the absence of the donee?

3. Will it be good, if the gift consist in the donor at his death, saying, "You will take the whole of my effects, together with my debts?"

Answer.

1. The wife should consent; and some land should be given her, sufficient for her maintenance.

2. Though the donee were not present, if the donor freely, and with gold, and pouring of water, give before witnesses, it will be according to Sastra.

3. It will not.

Remarks.

1. The gift by the owner would not be invalid, though made without his wife's consent.

2. No doubt, a gift may be made to an absent person. See passage cited in notes to Jimúta Váhana, ch. i. §22. And, concerning the delivery of gold, Mit. on Inh. ch. i. sect. 1. § 31.

3. It wants the formalities of a gift. C.

ZILLA OF CUDDAPAH.

Nacharummah and Another,

v.

Sashummah and Another.

The deceased Venganah, beside his son Singree, left surviving him the defendant Sashummah his wife, a daughter, two daughters-in-law, and a fraternal sister-in-law,—all widows. In his last illness, he directed that after his death, a certain sum, with his accounts and bonds being first given to his son, the residue of his property should be divided equally between him and the five widows. This was accordingly done; and the son having since died, the two daughters-in-law, above alluded to, claim to be entitled to share what he has left, as against the defendant Sashummah, the mother of Singree deceased. Qu. as to their right?

Answer.

The deceased Venganah, having a son, had no right to make the distribution stated.

The opinion proceeding to enumerate in order the persons successively entitled by law to inherit to Singree, concludes that, in the actual state of the family, the defendant, the mother of Singree, and not the parties claiming, is entitled to succeed to Singree's share of what his father Venganah left.

Remarks.

By law, as received in the school that follows the *Mitáchsharà*, *Smriti-Chandricà*, and *Mádhavya*, a father is restrained from giving away *immoveables*, without the concurrence of his sons: but he is not precluded from disposing of *moveables* at his discretion. (Mit. on Inh. ch. i. sect. 1. 27.) Considered then as a gift, the distribution alluded to, which seems not to have concerned land, should not have been deemed invalid. No doubt, the mother (and not the sisters-in-law) was entitled to succeed to the son's property. C.

The answer is no doubt correct as it applies, Whether Venganah had or had not a right to make the disposition he did? having been made, the question to be decided is, Who succeeds to Singree? for the previous distribution is not *sub judice*. The preference of the mother is probably correct. E.

ZILLA OF SARUN.

(A) Ram Tuwukbl Tievaree
(B) Lal Ram Tievaree } *Appellants.*

v.

(C) Four sons of Chutur Tievaree
(D) Ico Lal Tievaree } *Respondents.*

Raggoo Nath, deceased, was the father of A, C, and D. A is the father of B. It appears that C and D having instituted in the Zillah of Sarun a suit against A and B, claiming certain lands on the ground of their having been assigned to A by a deed in writing by their father Raggoo Nath, contrary to the Shastre, obtained a decree in their favour by the decision of the Registrar, which was confirmed in appeal by the assistant judge. The appeal of A and B to the Provincial Court not being admitted, they petitioned the Sudder Dewanne Adawlut for a special appeal; upon which that Court referred to their Hindu law officers the following questions, arising from the case as above stated, with the pleas urged by the appellants.

1. Supposing Ruggoo Nath to have acquired the lands in dispute by means of ancestral property, could he, in that case, assign them by deed to one of his sons, to the exclusion of the others?

2. Supposing them to have been not ancestral, but of his own acquisition, could he do so?

An answer, the Pundits replied;

That, under the circumstances stated, the father, in either case, was not competent to assign over, by any means, the lands in question to one son, without the consent of the others; a father not having power either to give or sell without the consent of his sons, whether land or slaves, though acquired by himself, much less where they have descended to him. And for this they referred to the text of Menu, cited in the Mitachshara, Vyavahara Madhavya, Vira Mitsodaya, Vivada Tandava, &c. &c.

Communicated by Mr. Sutherland.

ZILLA OF GANJAM.

Sept. 5, 1805.

A Brahmin having separated himself from his family above sixty years ago, made a formal division with his brothers; and, having no male issue, gave his *meerass*, or right of conducting the religious ceremonies in the houses of a certain class of people, to his son-in-law, and died. His nephews and other relations having put in their claims, who is entitled to it according to the Hindu law?

Answer.

The gift to the son-in-law is valid, provided it was made with the consent of the giver's wife; or, if he had none, of his mother, grandmother, or other relations whom it was his duty to maintain, subject to there having been other property remaining sufficient for their support. The owner may dispose of his property as he pleases, first setting apart enough for the maintenance of his family.

Remarks.

The necessity of every one to provide for the maintenance of his family, and their consequent right to a sufficiency for that purpose, is generally admitted. The concluding part of this opinion is however too vague; in fact, it is not the case universally, that the

owner may dispose of his property as he pleases. *An individual cannot alien his real estate, to the prejudice of his heirs.* With respect to the case proposed, I agree with my Pundit that the gift was invalid; though he thinks the son-in-law, during his wife's life, might, as her representative, have enjoyed the right conferred. "*Pamohitya*" is the technical name of the object of the gift. Of this, three descriptions are recognized. 1. The "*Kramagata,*" or ancestral. 2. "*Swayankuta,*" or self-acquired. 3. "*Agantuka,*" or temporary. The two former are regarded as "*Vrilti,*" subsistence; and, by custom, considered as analogous to real property. The last is merely incidental. From the term "*meeras,*" used in the statement of the case, (being an Arabic word, signifying *heritage,*) it would appear that the disputed *Pamohitya* was of the first description above-mentioned; in which case, there can be no doubt but that the gift was not valid against the nephews of the donor. S.

ZILLA OF VIZAGAPATAM.

December 17, 1808.

The family of the deceased, a Hindu of the Banyan tribe, consisted of his wife and the widows of two sons dead without leaving issue; when, being at the point of death, he caused to be drawn two instruments under two several dates, purporting, that nothing should be given to his elder daughter-in-law, except the jewels she had worn during the life of her husband; but that the younger one should have some of the moveables, beside her ornaments; and that all the rest of his property, moveable and immoveable, should belong, in certain specified proportions, to his blood relations, his servants, and his widow.—Are these instruments valid? And, if not, in what manner are the three widows, *i. e.* the widow of the deceased, and his two daughters-in-law, living together, to divide the estate?

Answer.

The Pundit, protesting against acts done under the influence of prejudice or resentment, proceeded to say, that, subject to the instruments, the control of the whole, in default of male issue, devolves on the widow of the deceased; and there is no authority for dividing the property between her and the daughters-in-law, without her consent. If she consent to a division, it should

be into four parts; of which she should take two, and the two daughters-in-law one each.

(Signed) DUSHYHANAIN, *Sastree.*

Remarks.

A disposition of property made under the influence of anger, as of any other violent passion, disturbing the intellect, is by law invalid. But the objection must appear from other circumstances than the mere fact of the disposition being different from that which the law would have made without it. The whole property in question was vested in the father, and he, having no surviving male issue, was not restricted by law from disposing of immoveables, as well as moveables, at his discretion. Whatever was not so given away by him would devolve by inheritance on his widow, and, after her death, on his legal heirs; and, according to an opinion which is supported by the author of the *Veijayanti*, a commentary on Vishnu, the widows of sons, who died before their father, are entitled to succeed to him. But this doctrine, on which alone the daughters-in-law could found any pretensions to participate, is not generally received in the schools which follow the *Mitacshara*. C. — See Append. to ch. vii. On Inheritance, p. 240.

Mr. Ellis, in a remark reflecting with considerable freedom on the Pundit in this case, was of opinion that the widow of the father was the heir, and that the disposition of the deceased was of no validity.

ZILLA OF GANJAM.

A Brahmin having some landed property, gave it to his paternal nephews, who had been divided from the family; and died, leaving his widow, and a widowed daughter-in-law, surviving him.—Qu. was the gift competent, according to the Hindu law?

Answer.

It is defective, in not having allotted a part for the maintenance of the women; a gift by a man, leaving his family destitute, being strictly forbidden.

Remark.

In this case, the Brahmin had no male issue living; and supposing provision to have been made for his widow and daughter-in-law, the gift to the nephews was probably valid, though the wife was the heir at law. S.

ZILLA OF GANJAM.

A Brahmin having a son, and a grandson by another son deceased, a few days before his death, drew out a paper in the name of *Sree Veneataswaraloo*, (the god worshipped at *Tripetty*,) stating, that the whole of his property being divided into four parts, two of them should be retained by himself, one belong to his son, and the remaining one to his grandson, the representative of his elder son deceased; the two latter to enjoy their shares during their respective lives, the same after their deaths to vest severally in their widows. Signed by the parties, it was attested by witnesses. Nevertheless, the son subsequently, before the death of his father, objected to the disposition. Since the death of the father, the widow of the latter having brought a suit to recover the shares reserved by her husband under the writing referred to, you are to say whether it be valid, and she entitled under it to the shares in question? Or, whether she is entitled to be maintained only; and, if so, how much is to be paid her annually out of the property for her maintenance?

Answer.

The writing alluded to is inconsistent with the Hindu law, according to which the estate of the father can never be inherited by another, while there are sons. The widow, therefore, must be content with mainte-

nance, which should be an annual allowance, suitable to her rank and condition.

Remark.

The deed in question does not appear necessarily inconsistent with the Hindu law. The only part that seems liable to future objection, is that which stipulates the reversion of the shares of the son and grandson to their widows. This would be invalid and void, so far as it went to affect real property, if the son or grandson left an heir preferable to their widows. As the case is stated, I do not understand that the writing contained any condition that the two shares reserved by the Brahmin shall survive to his widow. Did it, I conceive that it would be valid as against the son and grandson who voluntarily signed it; though not as against any other preferable heir to the widow, so far as real property might be concerned. So that, during their lives, the widow would be entitled to their interest in it, and no longer; unless it continued to her by operation of law. S.

ZILLA OF COMBACONUM.

September 10, 1808.

The deceased, having sons and daughters, in his life-time divided his estate with his sons, giving to his wife a portion of land, for her life.—Was the latter gift valid?

Answer.

It was.

Remarks.

Land may be given by the husband to his wife in *Stridhana*, and will be her absolute property. The gift in question, however, appears to have been for life, and seems to be merely an allotment for maintenance, in which case too it is doubtless valid, and the land will be at the son's disposal, after the widow's death.

C.

ZILLA OF CHINGLEPUT.

October 15, 1803.

A man having assigned, as part of a portion for his daughter, a female *Pariah* belonging to him, is the assignment, which is in writing, good?

Answer.

If the woman come within one of the five descriptions of slaves, that are not to be emancipated, the portion, partaking of the six essential qualities of *Stridhana*, will be good in law.

(Signed)

T. KISTNAMA CHARIAR, *Pundit.*

Remark.

There is nothing in the law to prevent a slave being given, like any other property, as a nuptial present. C.

A native of Bengal (Hindu) having lost the sons that he had by his first wife, in order to reconcile her to his purpose of taking a second, settled some houses and grounds upon her, but without giving possession of them; to obtain which, she brought an ejectment against him in the Supreme Court; which the Pundits of the Court considered to be maintainable, upon the ground of its being *Stridhana*, which it was illegal for any one to withhold; reporting, at the same time, that her dominion over real property, derived from her husband, consisted in enjoyment, and did not extend to alienation.

Remarks.

The opinions delivered by the Pundits in this case appear conformable to the doctrine received in Bengal. A wife may not aliene, as she pleases, her real "peculiar property" (*Stridhana*) bestowed by her husband; but I imagine she is absolute with respect to such property, derived from any other quarter. Jim. Vah. ch. iv. sec. 1. § 23. What precedes is applicable to the doctrine of the Bengal school. According to the Benares, and Maithila authorities, the restriction upon her as to real property is general. S.

ZILLA OF VIZAGAPATAM.

January 23, 1810.

A husband, surviving his wife, died, leaving only a daughter, who succeeding to his property, which was in land, her husband took upon him by writing, to dispose of a part of it to a Brahmin, the wife objecting at the time to the alienation. The granter having, in consequence of this opposition, got back the deed, the Brahmin brought his action to recover the land, insisting on his right under the grant. On reference to the Pundit of the Court, he is of opinion that the right of the daughter to succeed was clear; and that the husband had no power to dispose of any part of the land so descended, without her consent.

Remarks.

Here the married daughter inherited in default of male issue, widow, or unmarried daughter.—Mitacsh. on Inh. ch. ii. sect. 2, 3, &c. Her husband was precluded from using his wife's property, unless for the performance of some indispensable duty, or in circumstances of distress.—Ibid. sect. xi. 32. C.

ZILLA OF BELLARI.

July 23, 1808.

Hammuckah, *v.* Rungapah.

The Defendant states, that toward payment of the money adjudged due from him to the Plaintiff, by the decree of the Court, his only property consists in the ornaments worn by his wife, who is yet but seven years of age. Are they liable to be seized in this case, in execution for the debt in question?

Answer.

It appears from Catyayana, that a husband cannot appropriate jewels given to his bride, even for his necessary maintenance; and the judgment recovered by the Plaintiff, must be satisfied by other means.

Remarks.

The answer supposes the ornaments to be the wife's property *(Stridhana)*, given to her outright; but the question leaves it dubious whether they might not be the husband's, and only allotted to her for wear. In distress, the husband may for his relief, take his wife's separate property *(Stridhana)*.—Mitacsh. on Inh. ch. ii. sect. xi. § 31.—But he is not compellable by a creditor to do so; in other words, the creditor cannot seize the wife's goods in execution for the husband's debt.

C.

One of the circumstances, under which the husband may take the *woman's property* of his wife is, "under "arrest." The creditor indeed could not seize the jewels in possession of the wife, and forming her *Stridhana;* but he might have arrested the husband, who might then have legally appropriated them to the payment of his debt. E.

ZILLA OF CHINGLEPUT.

May 31, 1803.

On reference to the Pandit, as to the form and effect of a deed of *Stridhana*, he certified in substance as follows:

Answer.

Stridhana means an estate given to a woman. In a deed conferring it, the year and month should be mentioned, with words to the effect following:—"I give "you so much out of my estate as *Mungale Drauya*, "or matrimonial portion; (literally, ceremony money;) "and you are to enjoy it as your own." The property so given descends from her to her daughter; if she have no daughter, to her son.

(Signed) T. KISTNAMA CHARIAR.

Remarks.

This is deduced from general maxims concerning the form of a solemn deed. Given to her by her kinsman at her marriage, or before, or subsequently to it, the property is her *Stridhana*. See Mitacsh. on Inh. ch. ii. sect. xi.—For succession to it after her death, see Id. sect. xi. 11, 12, et seq.

The Pandit (in a case missing) reported, that if a man having been in possession of the land of another for *twenty* years, the owner, living in the same village, in all that time, make no claim, it becomes the property of the occupier; and, on the same principle, if one have been allowed to retain, undemanded, another's money for *ten* years, the lender living all the time in the same village, it is irrecoverable.

Remarks.

See Jagannatha's Dig. b. 1. cxiii. C.

This is not the law, according to authorities in this (the Southern) part of India. Vijnyaneswara, after a long argument, rules, that it is the *perishable produce* only of land that cannot be recovered after the expiration of *twenty*, and of other property after *ten* years, such land, or other property, having been enjoyed to the exclusion of the owners, by his default, or in his view. With regard to *land*, he holds that, if *legal acquisition* can be disproved, even after the expiration of a hundred years, (considered as the measure of the life of man,) ownership is not established by possession; and he accordingly declares, that "even beyond the period of "memory, if there exist a current tradition of the *illegality* "*of the acquisition*, the enjoyment is not valid." And it is observable, that, to render it so in any case, it must have been in view of the owner. In fact, according to the original and correct doctrine of the Hindu law, enjoyment or possession can never be cause of

ownership, it is a presumption of it only; but, if the want of original title can be shewn, the possessory holder may, *at any time*, be divested of the property. This applies not merely to land, but to property of every description. The Hindu canon is, "Acquisition "must be shewn;" all else is exception. Menu says; "He who enjoys without ownership for many hundreds "of years, the Lord of the earth shall inflict on that cri- "minal the punishment ordained for thieves." C.

APPENDIX TO CHAP. II.

BOMBAY.

Broach.—Court of Adawlut, Jan. 25, 1812.

Upon the case referred, and consideration of the law, it appears to us, that the right of "*Wagdan*," or betrothing a girl, and of marrying her after, belongs, in the first instance, to the father; if he be not living, then to the paternal grandfather; failing him, to the brother of the girl; if she have no brother to her paternal uncle; in default of such relation, to her male cousins on the same side; and, ultimately, to her mother. In the present case, the girl's paternal uncle has the right.—Referring to a text in the Mitacshara.

(Signed) NIRBHUYRAM, *Sastree.*
WALUBHRAM, *Sastree.*

Remark.

The passage in the Mitacshara is part of Yajnyawalcya's text (part i.)—"The father, paternal grand-"father, brother, kinsman, remote relations, *(saculya,)* "and mother, are the persons to give away a damsel; "the latter respectively, on failure of the preceding."

C.

ZILLA OF VERDACHELLUM.

Narasummall, *v.* Ragavendrachoree.

Nov. 24, 1809.

A son refuses to maintain his mother, alleging that, without his consent, she married off two of her daughters, receiving at the time a certain sum from each of their respective husbands.—1. Does this exonerate him from the obligation of maintenance?—2. Is she entitled to retain money so received?

Answer.

The son's obligation of maintenance is not discharged by what is stated, neither can he call his mother to account for the money in question received by her, provided it were given to her for her own use.

Remarks.

The brother of the girls, not the mother, had the right to give them in marriage. But she does not forfeit her maintenance by that assumption of the son's privilege.—As to the receipt of money for giving a damsel in marriage, it is reprobated by Menu, ch. ix. ver. 98, and 100. Being a present voluntarily given to the mother, it cannot be claimed by her son, nor set off against her maintenance. He had no right to any gra-

tuity for the marriage of his sisters, and therefore cannot claim it as his due. C.

The mother had no right to marry the daughters without the consent of her son, under whose protection she and they were; but he ought to have prevented it at the time. E.

MADRAS.

Sudder Dewanny Adawlut.

A Hindu, employed in the army, dies, leaving at his death a betrothed wife, with whom consummation had not taken place; together with concubines, and both adopted and illegitimate children; and, with respect to property, a pension payable to his heirs.—Who are, in this case, his heirs?

Answer.

The adopted children are entitled to the pension, subject to the obligation of maintaining the concubines. It is so held in *Vivandabhangarnava*, "on partition of "patrimony." But it is not said that women with whom marriage has not been consummated, and illegitimate children, have any claim to inherit.

(Signed) VENEATASA, *Sastree.*

Remarks.

If what is here called *betrothment* be the first, or real marriage (for the fetching home of the bride at the age of puberty, commonly called the second marriage, is merely the solemnization, not the celebration of the rite) —the woman cannot be married again,* (except in

* In a late case before the Sudder Dewanny Adawlut, of Madras, where a marriage had been interrupted by the death of the husband subsequent to betrothment, and before consummation; the young woman who survived, claimed to inherit to the deceased as his widow; or to be entitled at least to maintenance out of his assets. But the suit was compromised. Veneataram v. Venestasbobormell. Fourth Term, 1824.

some castes, where custom supersedes the law)—and, as I know of no distinction made by the Hindu priests between consummation and non-consummation, she is, in my opinion, entitled to be considered in every respect as a wife. E.

BOMBAY.

Broach.—Court of Adawlut, Sept. 6, 1811.

In the case of Kubyan, who first betrothed his daughter to Pranwulub, the brother of Ruseek, and afterwards to Vesoor, on complaint, the custom of the caste having been ascertained, by assembling witnesses from Broach, Oklesum, and Hansit, it appears, that where the first betrothment has been accompanied with presents, it is conclusive; and it appearing in this case that the one in question was accompanied by the delivery of a sum of money, as part of the *Pulla*, or bridal presents, we are of opinion that, as well according to the custom of the castes, as the law, the first betrothment ought to be established, and have its effect; it being ordained in the *Mitacshara*, that a girl shall only be betrothed once, unless the betrothment that has taken place be liable to be revoked for sufficient reasons, such as disease, bad conduct in the man, and the like.

(Signed) NISBHYRAM, *Sastree.*
WULUBHRAM, *Sastree.*

Remark.

See passages cited by Jagannatha, book iv. ver. 180. also, ver. 176. and 178. C.

BOMBAY.

Broach.—Court of Adawlut.

The father in this case having betrothed his daughter, in consideration of a sum of money stipulated, the betrothment is *Asaor Viva;* and, on payment of the money, it cannot be set aside;—otherwise, it may.

Remark.

See Jagannatha's Digest, book v. ver. 499. 3. Menu, ch. iii. ver. 31. and Mitacsh. ch. i. sect. 4. 6. There is no special provision in the law for the case of a promise to contract an *Asura* marriage. The tenour of the agreement must determine, whether, under the breach of such promise, the stipulated sum is to be recovered, or a compensation. C.

BOMBAY.

Broach.—Court of Adawlut.

The betrothment in question cannot stand, the Mitacshara declaring that those only whose *gotra* are not the same may be betrothed to each other. And whatever bridal presents may have been given by the boy's father or family to the father or family of the girl, must be returned.

(Signed) NURBHUYRAM, *Sastree.*

Remark.

See Menu, ch. iii. ver. 5. C.

ZILLA OF COMBACONUM.

1. A man having engaged a young girl as wife to his son, if, on his way to fix a prosperous hour for the wedding, he should meet one carrying a pot with fire in it, a single Brahmin, or a cat, are these signs, on account of which the marriage should be stopped?

2. If stopped, is the present given by him to be returned, notwithstanding the preparations made for its celebration?

Answer.

The marriage under such circumstances should be stopped, and the presents be returned. Of the preparations, what is saleable should be sold; for the rest, there should be an allowance.

(Signed) P. VENCOO, *Sastree.*

Remark.

The auspices being bad, the parties would of course, conformably with Indian notions and prejudices, abstain from proceeding further, toward effecting the intended marriage. Presents made in contemplation of it must certainly be returned. C.

ZILLA OF CUDDAPAH.

Chingleroyalo, *v.* Venertaroyalo.

Can a promise by one to give his daughter in marriage to a particular person, be enforced in law, and how?

Answer.

The match being a suitable one, and the Defendant having received from the Plaintiff a sum of money, toward the expense of the marriage, on refusal of the Defendant, the magistrate should send for the father of the girl, and make him perform his contract. If he persist in refusing, he is liable to be punished by fine, and otherwise.

Remark.

See Menu, cited by Jagannatha, book iv. ver. 171. But for sufficient cause, the promise may be retracted. Id. ver. 178. E.

ZILLA OF CHINGLEPUT.

June 30, 1806.

Upon complaint of a woman against her husband, claiming food and raiment, he accused her of adultery. Upon examination, one of the witnesses took his oath both in the Court, and in the Pagoda, that at an assembly of all their relatives, on being charged, she confessed the fact. Another swore in like manner, that he had heard her admit as much; and a third witness deposed that he heard the first tell his relations what she had confessed. It was further proved that she had been seen going with a herdsman, and that she had remained with him for a considerable time out of the village. Assuming her guilt, is her claim maintainable?

Answer.

The Pundit, reciting all the circumstances, reported that the husband was not compellable to provide such a woman even with food and raiment; and that she was liable to be repudiated by him, in the presence of their relations; referring to Menu.

(Signed) FERUMALY KISTNAMA CHASIAR.

Remarks.

Menu nowhere says, that a woman divorced is not entitled to a maintenance. She is to be "abandoned;" deprived of nuptial rites; she is to be divested of her ornaments, and separate property; but she must be maintained: as must an outcast be by his family. E.

ZILLA OF MADURA.

If a married woman quit her husband, and elope with another, is the latter answerable to him for the loss of her society?

Answer.

He is not.

(Signed)

SASHADRY TYENGAR.

Remarks.

The law prescribes punishment for adultery; not pecuniary reparation to the husband for the loss of his wife's society. C.

Answerable to him pecuniarly?

No:—It is by the Hindu law a criminal offence, and punishable, as such, both in the man and the woman.

E.

ZILLA OF VIZAGAPATAM.

1. Is an action maintainable by the husband, to recover against the adulterer damages for criminal conversation with his wife? 2. What is eventually the measure of such damages?

Answer.

The husband, in the case in question, has a claim to be reimbursed by the adulterer the expenses of the *Gata-Sraadum*, and of the ceremonies attending his marriage; and, if desirous of another wife, a right to recover those also of a second marriage—to be computed according to the custom of the country, the times, his caste, and any special circumstances.—Citing Menu, and a number of other books.

(Signed) NARAYANA.

Remarks.

If the books cited contain passages that support this opinion, I have not been successful in searching for them. At the beginning of the answer, reference is made to prevailing customs, on which probably it is founded, rather than on express provisions of the law.

C.

Narayana says it is in conformity with Menu, &c. And, no doubt, in equity, the payment of the marriage

expenses of the husband, deprived of his wife by the seducer, cannot be condemned; but I know not that it is any where prescribed by law. The punishment for every species of adulterous intercourse is most minutely laid down; and the act is, in all its bearings, considered solely as a criminal offence. E.

ZILLA OF VERDACHELLUM.

January 10, 1812.

Tonda Moontee, *v.* Soobban.

The Plaintiff having brought his action to recover of the Defendant damages for a criminal conversation with his wife; it was referred to the Pundit of the Court to say, whether, to sustain it, it was necessary to have direct proof of the fact, or if it might be collected from circumstances. The Pundit, premising that the injury was not actionable, but punishable by fine or penance, said, there was no necessity for an eye-witness of the crime complained of; for that, if a man should use equivocal expressions to another's wife, or laugh with her, and ogle, or eye her with amorous looks, or if he should hold conversation with her in such a place, or at such a time, where, or when he ought not to have been speaking with her;—any instance of this sort is to be regarded as a crime in the first, or lowest degree. Or, if a man, with the view of seducing the wife of another, should send her fragrant sandal powder, or flowers, such as jessamine, &c. or perfumes, or jewels, or wearing apparel, or edible fruits; if any of these circumstances be proved against him, it is a crime in the second, or middle degree. If a woman and a man should meet in a secret place, or should embrace one another, or if they should sit together on a bed, or re-

main together in a dark place, or if he should converse with her, handling her hair at the time amorously, or should wound her breast with his nails, or her lips with his teeth, or untie the knot of her cloth, or,—— if any of these circumstances should be proved, the crime imputed is to be inferred.

Remark.

The Pundit is right in his opinion, that damages cannot be recovered for adultery; and the Court ought not to have proceeded in the cause, it being one of those cases of caste and family rights, in which the full operation of the Hindu law is admitted by the regulations. The circumstantial proofs, specially allowed by the law in cases of adultery, are very correctly enumerated. E.

ZILLA OF CUDDAPAH.

Pullen Sitty Nagoo,

v.

Siddanatum Kristnadoo.

In this case there is referred to the Sastree, a petition, an answer, a reply, and a rejoinder; and an answer is required from him on the subject, agreeable to *Dherma Sastra.*

Answer.

On the face of the petition, the petitioner is irreproachable; on that of the answer, she appears guilty of a great crime. But her misconduct ought to be proved by witnesses; and, if proved, she should then, and not before, be dealt with as an adulteress. And, should the husband fail in his proof, he will have incurred the penalty of having forsaken a chaste wife; and she will be entitled to a third of his estate.

Remarks.

The desertion of a chaste, unoffending wife, subjects the husband to the obligation of maintenance, assigning to her for that purpose a third of what he possesses. See Jagannatha, book iv. ver. 72. He is even liable to the punishment of a thief, according to the Smriti Chandrica.

C.

ZILLA OF CHINGLÉPUT.

Aug. 22, 1803.

A married man having connected himself with another woman, his wife quitted him, and returned to her father's house. Her father would have sent her back, but she refused to go. Under these circumstances, can the husband maintain an action against the father, for the expenses of the marriage?

Answer.

Under the circumstances stated (presuming the parties to be *Sudras*), the father will be answerable to the husband in damages for his daughter's contumacy; and if, thus living apart from her husband, any of her caste have connexion with her, the adulterer incurs a fine, as well as the expenses of the marriage. It is so held in the *Verdarajum* Sastra, in the part called *Streepunjayagum*.

(Signed)
TERUMALY KISTUAMACHARIAR.

Remarks.

The authority cited is not on this side of India; and the opinion delivered in this case would not be here considered as good law. The husband himself violates the law, and is liable to punishment for his mis-

conduct. Surely the wife cannot be compelled to return to him, while he persists in it; and his reformation is not stated. C.

The entertaining a concubine is a justification to the wife, subjecting the husband (if she choose to live apart from him) to the obligation of maintaining her separately, *i. e.* of supporting her according to her condition; and, asserting her claim, she is entitled to her thirds, even during her husband's life. The strange law, above propounded, professes to be confined to Sudras; and it may possibly among this caste have some foundation in practice. E.

ZILLA OF CUDDAPA.

D. Narayana,

v.

Jungum Nargaloo and Others.

Upon reference of the papers in the cause to the Pundit of the Court, he reported, that, if a man forsakes a faithful wife, by whom he has children, he should be ordered to take her back; and, on refusal, be made accountable to her for a third of his property. That if, under similar circumstances, he takes a second, leaving the first, without the consent of the latter, he is punishable, and at the same time answerable also to the first for her thirds; and that whoever was accessory to such second marriage, is likewise punishable.

Remarks.

The *Smriti Chandrica* teaches, that one, who deserts his wife without cause, is liable to be punished as a thief. It may be inferred, that the accomplice is subject to punishment likewise. That one who counsels, or approves an act, is an accomplice in it, is indeed a doctrine applicable equally to sins, as to crimes; and accordingly inculcated by passages of *Paithinasi*, *Apastamba*, and other authorities, cited by writers on penance and expiation; any more direct has not been found for the position. C.

The general law in the beginning of the opinion appears rightly delivered. I am not aware that punishment by the magistrate is any where appointed for a second marriage, howsoever contracted. E.

CHITTOOR PROVINCIAL COURT.

April and May, 1808.

A Hindoo, having a wife, by whom he had a son, took a second, leaving the first, and afterwards died, leaving behind him a testamentary writing, by which, among other things, observing that his wife was unfit to manage his family, he gives her a thousand pagodas worth of jewels. The will having been referred to the Pundit of the Court, in his remarks upon this part of it, the Pundit said, that having borne him a son, to whom there did not appear to be any exception, the pretence of the mother being incapable of managing the family, could not justify the deceased in taking another wife, dismissing the first on the terms stated; since, according to the *Achára Candam* of Vijnyaneswara, he was bound to have assigned to her a third of what he possessed; and, possessing nothing, to have provided her at least with food and raiment. That, supposing her to have had a portion on her marriage, she would, upon her husband taking a second wife, be entitled to the difference between it and the sum expended on the second marriage; and, if she had had none, then to a sum equal to the amount of such expense; and that the provision made her, not corre-

sponding with either of these standards, was not consonant to law.

(Signed)

ALAGA SINGARA CHARIAR.

Remarks.

See passages of Yajnyawalcya and Vijnyaneswara, quoted by Jagannatha, 3 Dig. 8vo. ed. p. 17, 18. Also, Mitacshara, on Inh. ch. ii. sect. xi. p. 35.—The woman was entitled to a compensation, amounting, with her previous *Stridhana*, to a value equivalent to the expenses of the second marriage. C.

The best rule, in case of the abandonment of a virtuous wife, appears to be, that she is entitled to suitable maintenance, the ultimate measure of which is one-third of the estate of her husband; he also, according to the circumstances of the case, is liable to corporeal punishment. But the claim at all events ought to have been urged against the husband in his life; it cannot affect his heirs. The instrument left by the deceased is invalid; and the elder wife shares his estate, as such, with the other parceners, or continues in the administration of the united families, under the protection of his son. E.

BOMBAY.

Broach.—Court of Adawlut.

April 25, 1810.

On reference to us, agreeably to the law of Dherma Sastra, the case is as follows:—Kubyan, acknowledging his disability, requested that he might try the effect of medicine. Accordingly two months were given him for the purpose, to which a third was afterwards added, but no accession of virility was obtained. It was then proposed to him to submit to the test ordained by the Shaster; but he refused, offering instead to make his wife the judge, which was agreed to; but he never went near her, procrastinating matters, under various pretences, till about four or five days ago, when, having quarrelled at night, they came to us, reciprocally accusing one another. Upon the whole, from the declarations of the parties, and the deposition of the witness Umooluk, as well as from his declining the proof required by the Shaster, it appears to us, that Kabyan is impotent. Therefore, as his caste admit *natras* (or second marriages), he must release his wife; and, if he refuse, he must be compelled.

(Signed) NIRBHUYARAM, *Shastree.*
WABUBHRAM, *Shastree.*

Remark.

This is analogous to cases, for which provision is made by a passage of Devala, cited by Jagannatha b. iv. v. 151. C.

BOMBAY.

Court of Adawlut at Broach.

April 10, 1806.

It is written in the *Pooranas*, that though a man be irreligious, immoral, and unfortunate, yet his wife is not at liberty to forsake him. Such is the case of the husband of Saukar, who is accordingly desirous to leave him and marry another, but it must not be permitted.

(Signed) NURBHUYARAM, *Shastree.*
ROOPSHUNKER, *Shastree.*

Remark.

Cases in which a woman may forsake her husband, are stated in a passage quoted by Jagannatha, b. iv. v. 151.

ZILLA OF VIZAGAPATAM.

Nov. 15, 1808.

A Brahmin having, in default of children by his first wife, taken a second, an agreement was executed on the occasion between him and his first, by which it was, among other things, provided, that she should not be at liberty to dispose of her ornaments, without his consent. Upon which the following questions have occurred:

1. What is the right of a married woman with respect to her ornaments?

2. Was the agreement referred to competent between the parties?

3. Admitting it to have been so, is the wife answerable for a breach, in having disposed of some for her subsistence, her husband neglecting to provide for her?

Answer.

The jewels given by a husband to his bride, at the time of her marriage, or subsequently, in consideration of it, are her absolute property; and, as such, at her disposal. They are her *Stridhana*, and are distinguishable from what may be supplied her from time to time after, for the decorating of her person; the latter she can only wear; they remain

the property of her husband, forming no part of her *Stridhana*, nor of course disposable by her without his permission, even for her necessary maintenance. Taking the subject of the agreement in question to have been of this description, the stipulation was competent; and it being contrary to the rules of the Dherma Sastra, and the custom of the Banian tribe, for a wife to take upon herself to alienate such ornaments, even though for her necessary support, without her husband's privity, an action lies against her for so doing, independent of agreement, and much more so where there has been such a breach.

(Signed,) DUSKY NANAIN.

Remarks.

If the ornaments were not *Stridhana*, they must have been her husband's property; and, as such, could not be disposed of by her; and an action will lie in this case. But, if they were the wife's *peculiar property*, she had full power over them, laying out of the case the special agreement, as proposed to be done by one of the questions. And, even under that agreement, by which she promised not to dispose of them, she might nevertheless justify the breach, under circumstances of necessity, arising from his default in failing to supply her with necessary maintenance. At all events, the promise being without equivalent, an action at law will not lie upon it, the breach of it being but a moral fault, not a civil injury. C.

I should think that if the agreement were made respecting her *Stridhana*, it would be obligatory (like any other engagement respecting property) on the wife. E.

See a distinction between worn and unworn ornaments, *Menu*, ix. v. 200. 3. D. 571. Mitacsh. ch. i. sect. iv. 19. This, it is apprehended, cannot refer to *Stridhana*, as *that* belongs to the wife, under any circumstance. T. A. S.

ZILLA OF GANJAM.

A Brahmin having, at the time of his marriage, given some gold and silver ornaments to his wife, who continued to reside with her mother, and died many years after, never having lived with her husband, but having been supported during a great part of the time by her brothers, to whom does the succession to her ornaments belong?

Answer.

Though the woman in question never lived with her husband, yet if her conduct was otherwise unimpeachable, he was bound to provide for her; which, if he neglected to do, her brothers who supported her are entitled to be reimbursed out of the property in question, whatever they expended for her necessary maintenance. The remainder belongs to her surviving husband. The property of a woman dying without issue vests in her husband.

Remarks.

The husband, on failure of progeny, is heir to the wife's peculiar property (her *Stridhana*). During her life, he was certainly bound to maintain her; and, any one else doing so, I should think such person, on the death of the wife, could have no right to withhold the jewels, &c. left by her, from the heir to them. He should be left to sue the husband for reimbursement; with respect to his right to which, a reasonable doubt would arise, should it appear he had voluntarily supported the deceased wife. S.

ZILLA OF CUDDAPA.

May, 1807.

Siddummah, *v.* Gungooloo.

The parties are man and wife. The Plaintiff having borne the Defendant a female child, he thought proper to part with her, on the pretence of her having mixed noxious ingredients in his rice, of which there is no proof. Pregnant at the time of separation, she soon after produced him a boy. Under these circumstances he took a second wife; when their caste having been appealed to, he was warned to provide for his first. This he refusing to do, they expelled him; and the present action being brought, the question is, whether he is not bound to provide for her, and to what extent?

Answer.

It is said by Devala, that a man, desirous without cause given him by his first wife to take another, should conciliate his first by presents, and that then he may marry again. Menu says that, when the first, subject to continual indisposition, demeans herself properly toward her husband, he should make a settlement upon her first, before he takes another; being careful not to give her unnecessary offence. In the present case, there being no proof of misconduct on the part of the Plaintiff, if the Defendant was desirous to take another

wife, he should have reconciled the first to his purpose, by the prescribed means. It is further held by Nareda, that, if a man forsake an affectionate wife, by whom he has children, he is punishable, and compellable to take her back; and that, if he persist in refusing, he is bound to assign her a third of his property; and, if he have none, at all events to find her in food and raiment

Remarks.

See passages, on which this opinion is founded, quoted from Yajnyawalcya, Vijnyaneswara, &c. in Jagannatha, book iv. ver. 72, and 74. C.

The title "Duties of man and wife," *Stripund'herma*, though forming technically one of the subdivisions of *Vyavahára*, or judicial proceedings, is considered in reality to be a branch of ethics; and some authorities deny that the infringement of these duties are cognizable by the ordinary magistrate. The better doctrine however is, that the restrictive texts, which appear to forbid the admission of suits between husband and wife, are intended only to indicate their impropriety, as regards the parties. Vijnyaneswara, therefore, in commenting upon this text, "The husband, if he do not please, is not liable to repay "the woman's property received by him in famine, for "charitable purposes, in disease, or under arrest," says, "If the husband expend the wife's money, excepting in "famine, and the rest, and do not repay it, though he "possess wealth at the time when it is demanded, then "an admissible suit may exist between them." But he

adds, "Such disputes will prosper neither in the visible, "nor invisible world; and therefore the parties are first "to be admonished by the king and his assessors; but, "if they persist, the cause must proceed in the pre-"scribed manner." The result is, that the admission of causes between man and wife ought, if practicable, to be avoided; but that justice must be administered, if the parties cannot be brought to terms. E.

DESCRIPTION OF A MARRIAGE BETWEEN TWO BRAHMINS;

Taken from a MS. Account of the Institutions and Customs of the Natives, in the Barahmal and Salem Districts of the Peninsula.

THE marriage having been agreed upon, the celebration of it takes place, on a lucky day fixed by the family priest (*Purohitâ*), or astrologer, for the purpose. On its arrival, the bridegroom with his parents proceed to the house of the bride, accompanied by the *Purohitâ*, with music, and dancing women, attendants carrying presents of fruit. The next morning, either party having performed their ablutions and ceremonies at their respective houses, the parents of the bride repair to that of the bridegroom, when he, apprized of their approach, having a cloth tied round his head, taking a staff in his hand, and throwing a wallet over his shoulder, with perhaps a book under his arm, preceded by musicians, and accompanied by a few relations, walks out in a northerly direction, exclaiming, with a loud voice, "I am going to *Causee*;"(1) upon which the parents of the bride, similarly accompanied, and contriving to meet him, request he will not go to Causee, and that they will give him their daughter. With this he stops; and, having a cocoa-nut put into his hand, the whole party return together to the house

(1) Benares.

of the bride, where being seated, the Purohitâ commences the marriage rites. In the course of these, a cloth, by way of curtain, being suspended from the roof, the bridegroom sitting on one side, the bride on the other, the Purohitâ recites verses to Vishnu, and other deities, praying them to watch over the destinies of the contracting pair. Then the curtain being removed, the bride and bridegroom pour handfuls of rice on one another's heads; while the father of the bride, having a little water and a piece of money in his right hand, puts them into his daughter's, and joining it with the hand of the bridegroom, says, "I give "this virgin to you for a wife." Upon this, the Purohitâ invests the bridegroom with a second shoulder string; and a small gold plate, called a *bhuto*, with a hole in the middle, having a string through it, being first presented to the company present on a salver for their blessing, is given to the bridegroom, who ties it round the neck of the bride. The *Purohitâ* then performs a *homam*, or burnt-offering, before the pair, putting grain into different pots. Other ceremonies follow, figurative of the ends of marriage, intermixed with *muntras*, or prayers, addressed principally to female divinities, for the happiness of the one in question. In the course of these proceedings, presents and offerings of clothes and fruits are made to the parties, and money distributed to the attendant Brahmins. Another homam being performed at night, the bride and bridegroom quitting the house, walk seven feet in the open air, gazing at the star named

Arundhati, when they re-enter, and being reseated, further ceremonies take place. These, with variations, are repeated five successive days. On the fifth, is performed the ceremony of dismissing the manes of their ancestors, who had been invoked to be present at the wedding. This is done by *chunamming* an earthen pot, and inscribing on it something like hieroglyphics. Other preparations being made, the new married couple walking round it three times fill it with boiled rice, or platters made of leaves, as oblations to the manes, who are thus considered as dismissed to their celestial abodes. The rice being afterwards taken out, the pot is stored up by the family. On the evening of the fifth day, the parties seated in a palanquin, or mounted on horseback, preceded by girls dancing and singing, and *bajuntries* beating *tom toms*, sounding trumpets, and blowing flageolets, and followed by some of the married women of the family, parade under a canopy, supported by bearers, and surrounded by relations and friends. In this manner, the procession having traversed the streets of the town or village, returns to the bride's house, where the whole ends with a feast; the expense of the marriage being defrayed, as may have been previously agreed.

If, which is not generally the case, previous to her marriage, the girl has arrived at puberty, consummation takes place on the first lucky day succeeding the celebration of the nuptials; otherwise, not till she shews the characteristic signs. These appearing, and being made known, and the day fixed by the Purohitâ

being come, the bride is carried to the house of the bridegroom, or rather it should be said now, the wife to that of her husband, when the ceremony of purification first, and afterwards a homam, or burnt-offering, is performed. Betel and money are distributed, and the relations of the respective families feasted, when the married couple retire.

Compare this account with the Abbé Dubois', p. 137, of the translation of his work on the "Character, Manners, and Customs of the People of India," &c. and with the one given by Mr. Colebrooke, in As. Res. vol. vii. p. 288.

APPENDIX TO CHAP. III.

ZILLA OF VIZAGAPATAM.

Question to the Pundit.

Among the twelve sorts of sons, are not the *Dwyámushyáyaná*,(1) &c. disqualified from inheriting in the present age? And, can any inherit in it but the *Datta* and *Ourasa*, the adopted, and the legitimate natural born?

Answer.

The right of inheritance is restricted in the *Cali yug* to the two descriptions of sons specified in this question, in exclusion of the other ten.

(Signed) PUNDIT APPIAH, *Sastree.*

Remark.

The answer is conformable to the doctrine received in most of the Indian schools of law. It rests on the authority of passages which are quoted as authentic by the Smriti Chandrica, and other works received in the South of India, particularly Saunaca and Vrihaspati, cited in those works. C.

(1) For an explanation of this, see Mitacsh. on Inh. ch. I. sect. x.

ZILLA OF SALEM.

Nov. 15, 1803.

The deceased left two widows, together with a widowed sister, who had lived with him after the death of her husband; also a mother,—To whom does his estate go?

Answer.

The mother must be maintained, and so must the sister, if left destitute by her husband. As to the widows of the deceased, they should adopt a boy; but if they cannot agree to do so, then the estate, after deducting as above, is divisible between them; and whatever remains out of the portion set apart for her expenses after the death of the mother, it is theirs.

Remarks.

These widows' right of succession is declared by the Mitacshara, on Inh. ch. ii. sect. i. 19.—Passages of law recommend, but do not enjoin, adoption; particularly *Atri*. (Institutes, 52.) "By him who has no male issue, a substitute for a son should be adopted, for the securing the oblations of food, and libation of water to the manes." And a text of Menu, of similar import (which does not however occur in his Institutes), says, "By him who has no male issue, a son, such as it may

be practicable to obtain, should be adopted, for the sake of the oblation of food, and obsequies, and for the honour of his name. C.

A woman cannot adopt, without the express sanction of her husband. S.

MADRAS.

Sudder Dewanny Adawlut.

A Hindu, employed in the army, leaving at his death, beside a betrothed wife, with whom consummation had not taken place, concubines, and adopted, as well as illegitimate children; and, with respect to property, a pension payable to his heirs,—Who are in this case his heirs?

Answer.

The adopted children are entitled to the pension, subject to the obligation of maintaining the deceased's concubines. It is so held in *Vivandabhargasvana*, "on partition of patrimony."

(Signed) VENECTASA, *Sastree.*

Remarks.

A Hindu cannot have legally adopted *children*. A son, legitimate or adopted, existing, any subsequent adoption would be invalid. At least, the son so adopted, would not inherit. Presuming in the present case a lawful adoption, the first adopted is sole heir. The wives, to the usual extent, the illegitimate children, and perhaps sons, illegally adopted, would be entitled to maintenance. S.

(For " Remarks on the answer of the Pundit, as it regards the claim of the virgin widow, see the same case in Appendix to ch. ii. on marriage, p. 25.—And, as to the competency of two co-existing adoptions, see the case of *Ceureepershaud Rai Jyamala*, Beng. Rep. 1814. p. 466.; and vol. i. of this work, p. 66.)

ZILLA OF CHINGLEPUT.

July 2, and 5, 1803.

The parties are Sudras, and the Plaintiff being a widow, her complaint is, that the Defendant withholds from her her husband's estate, alleging that he was adopted by him.

Ques. 1. What are the requisites of adoption among Sudras?—2. Does an adopted son succeed to the estate of his adoptive father, in preference to the widow?

Answer.

Among Brahmins, adoption should regularly be before the performance of the *Upanayana;* it will be valid however, though these should have previously taken place: but there can be no adoption of one who is married. Neither can an only, or an elder son be given. When a boy is to be adopted, the adopter should invite the relations of either party, and entertain them at his house, giving notice to the king (or principal authority of the place) of his intention; and then the husband and wife, waiting upon the parents of the boy, and stating that they have no son of their own, should ascertain if they are willing to give them one of theirs;—to which they assenting, the *Datta-homam* must be performed.(1) After adoption, the *Upanayana,*

(1) Vid. post. p. 192.

and the marriage of the adopted are to be celebrated by the adopter, the same as for a natural son; and all rites are to be performed in the *gotra* of the adopter, not of the adopted.—The same ceremonies, with the exception of *homams*, are to be observed in the other castes. The water called *Manjenum* should be drank in the presence of relations. The death of the husband approaching, so as not to leave time for the ceremony on his part, the widow, with his permission, may adopt. In either case, the adopted succeeds to the estate of his adoptive father, subject to his debts, and to the obligation of maintaining the widow.

(Signed)

T. KISTNAMA CHARIAR, *Pundit.*

Remarks.

Most of these rules are general: they are not all imperative. The notice to the king may be dispensed with. Vijnyaneswara distinctly prohibits the adoption of an only son, as does also the *Dattaca Mimánsa* of Nanda Pandita. In other respects, the rules and forms above stated are conformable to these authorities. No doubt, the adopted son is heir, in preference to the widow. See Mitacsh. on Inh.—ch. i. sect. xi. 9. 15. 33. C.

The general law of adoption appears to be stated above with sufficient correctness.—With respect to Sudras, the *Datta Mimánsa* of Madhavyum, (the principal

author in southern India on this point, as well as on *Mimansam* in general) says, that " to the Sudra there is no adoption;"(1) by which, however, is to be understood only that, in this caste, there exists, strictly speaking, no ceremonial for it; but that public avowal, or general notoriety of the fact, is sufficient, with them, to establish its validity. Ceremonial adoption cannot be necessary in the case of a Sudra, since, by the *Datta-Homam*, the adopted son is converted from the stock *(gotram)* of the natural, to that of his adoptive father; and Sudras have no *gotra*. Beside, they cannot perform the Datta-Homam, though they may perform an imitation of it, with texts from the Puranas. But the proper Datta-Homam can be performed only by those castes, which use the texts of the Vedas in their religious ceremonies;—and, in Southern India, scarcely any caste but that of the Brahmins now use these texts.—Therefore it is, that Kistnama Chariar, the Pundit, very properly restricts the rite of adoption to the Brahmins.

E.

(1) Vid. post p. 154.

ZILLA OF SALEM.

Nov. 15, 1803.

Chellummall *v.* Munummall.

Nellapa Reddy, deceased, left two wives, the parties in the present suit. The former complains that, as their husband is dead, leaving no issue, his estate should be divided, and she should have half. The defendant *Munummall* represents, that, as her husband's sister, a widow, lived long in the family, having become in a manner mistress of it on her husband's death, all the estate is in her possession; and she proposes that, there being, as she alleges, no custom in their caste for a division, a boy should be adopted, through whom they may obtain salvation. Add to this, the mothor of the deceased *Nellapa Reddy* is living. Therefore, how stands the law, as to dividing the estate between the widows of *Nellapa?* and what are the claims of the mother and sister of the deceased?

Answer of the Pundit.

The mother of the deceased, being otherwise unprovided for, sufficient allowance must be set apart from his estate for her maintenance. As to the remainder, his widows ought, with mutual consent, to adopt some one. If they cannot agree to do so, they should divide the estate between them equally. If the deceased's sister derived nothing from her husband, they should contribute jointly toward her support. Upon the death

of the mother, whatever may remain of her portion, after deducting her funeral expenses, should be in like manner divided.

Remarks.

If the requisite sanction had been received by either of them, mutual consent of the widows to adopt could not be necessary unless specially made a condition; nor, without such authority, could it suffice. See note on Mitacsh. Inh. ch. i. sect. xi. 9. Supposing no adoption authorized, or none made under an authority for the purpose, the widows, having equal rights in the estate, may no doubt share it, making due provision for the maintenance of those whom they are both bound to support. C.

This appears rather a question of partition, than of adoption. Adoption in this case was certainly not necessary, and perhaps not proper. To render it beneficial to the husband (for the widows can derive no advantage from it), his assent to it should have been given before his decease; but there is nothing in the case to shew, even by implication, that it was so. As no spiritual benefit results to a woman from adoption, there can be no adequate motive on her part for the act; (1) and the *Sastree*, therefore, though, in compliance with worldly custom, he might have recommended adoption, should not have stated it to be in any degree obligatory. He should at most have said *may*, not *ought*. E.

(1) Vid. post. p. 75.—S.

ZILLA OF VIZAGAPATAM.

Question to the Pundit.

Upon the death of a Brahmin, without issue, can his widow adopt?

Answer.

She may, having her husband's authority; — not otherwise.

Remark.

The answer is according to the doctrine of the Bengal school; but the followers of the Mitacshara, in the Benares and Maharashtra schools, admit the widow's power of adoption, without authority from her husband, if she have the sanction of his kindred. — See notes to the Mitacshara on Inh. ch. i. sect. xi. 9.

ZILLA OF VIZAGAPATAM.

The deceased, in his last moments, expressed his wish, that his mother should adopt his nephew as his heir; and died leaving a widow, aged five—. To whom does his estate belong?

Answer.

The mother was competent to adopt, having her son's direction for the purpose; and if she have complied with it, the adopted succeeds;—otherwise, the mother and widow together take the estate of the deceased.

Remarks.

Presuming the deceased to have been sole owner, the adoption of his nephew, (Quest. whether brother's or sister's son?) by his mother, would not make that nephew, thus becoming an adopted brother, heir at law to his separate estate. The widow was undoubtedly sole heir, (Mitacsh. on Inh. ch. ii. sect. 1. 39.) bound however to maintain her husband's mother. Quest. Did the request to the mother to adopt his nephew as *his* heir, mean the completion of an adoption begun by himself? or, as I understand it, the adoption of that nephew, as *her* son? C.

The facts perhaps are not stated with sufficient distinctness: but I am not aware that there is any thing incompatible in the delegation of a mother to adopt,

in the case of non-age of a widow. It should be observed, that the act of adoption is not on her own account; she acts merely as the deputy of her son; and the child adopted therefore becomes his, not her's. The Hindu law and religion allows of vicarious substitution, in almost every possible case. E.

I do not think the adoption by a mother, of a son for her deceased son, would be valid. In fact, *Nanda Pandita* denies the competence of a *widow*, even with the sanction of her *husband*, to affiliate a son for him: but the reason he assigns is unsatisfactory, and his position is controverted by other writers. (See note to § 9. sec. 11. of ch. i. of Mitacshara on Inheritance.) Though however adoption by a widow, under delegated authority from her husband, would be valid, it by no means follows that, under authority from her son, the adoption for him, by his mother, would be so. In the former instance, the widow not only adopts the son for her husband, but also for herself: this however would not be the case in respect to the mother. S.

ZILLA OF VIZAGAPATAM.

If a widow, having a son, should be desired by him, on his death bed, to adopt another in his room, will an adoption accordingly be good, being of one competent to be adopted?

Answer.

The father, while she is young, her husband after marriage, and her son in her widowhood, have the natural controul over females, whose respective sanction will authorize whatever they may do. It is universally held that they can have no will of their own ever. If, therefore, in the present case, after the death of the husband, the son, dying, directed the adoption that took place, it will be good.

Question II.

Was it necessary for the authority to adopt to be in writing?

Answer.

Permission in writing is certainly best, but verbal will do. The power takes effect from the assent of him who gives it, and a writing is not of the essence of the thing. Therefore, by whatever means it is understood to have been given, no defect will result from its not being in writing. The advantage of a writing is only as it renders the evidence more permanent.

(Signed) DUSKY NANAIN, *Sastree.*

Remarks.

As the husband's kindred may authorize the widow to make an adoption, (see note to Mitacsh. on Inh. ch. i. sect. xi. 9.) wherever the authority of the Vijnyaneswara, Mryacha, and works of the same school is followed, her son's sanction would no doubt be sufficient. It is otherwise, in Bengal, where no sanction but the husband's can avail.

A written authority is doubtless not indispensable. C.

The text of the Hindu law is, "*Patra vacshati vest, hápyé na stu swa tantia truyati,*" meaning that *the son protects her in her old age;—no woman is ever independant.* That the son, standing, to his widowed mother, as regards general protection, and the regulation of her will, in the place of his father, has, under the law, prescribing the consent of the husband as necessary to authorize adoption by her, a competency to invest her with such power,—this is impossible: but nowhere, in any *Sastram*, is it stated, that the consent of the son is necessary to legalize adoption by his mother. He does not in this respect represent his father: the protection he is bound to extend to her is distinctly that of a son, not of a husband; he does not govern her will, he only guides it; he does not command, he persaudes. On adoption, and similar questions, he may advise—he cannot authorize. E.

In the case of the Zemindar of Rajashahy, cited in that of the Rajah Nobkissin, Supreme Court, Calcutta, in the time of Sir John Anstruther, Ch. J.

Translation of Bengal paper, dated 9th of *Burnagur*, under the signature of Rajah Ramahaunt; addressed to the Rannee Boshannee Dehya, authorizing her (as his widow) to adopt a son after his decease.

"I grant this license in the year 1153 ( ), "being visited by an inveterate disorder, which increases "daily, and unable to foresee what the Divine Providence "may ordain the next moment. It was my wish to adopt "a child myself; but at present there is none at hand. "To send for one would be attended with delay, which "I should have no hopes of outliving. I therefore, of "my own free will, permit you to adopt a son. After "my death, whenever you may meet with a child, you "may adopt him in my name. So that the daily offerings "for the salvation of our souls may be duly performed, "and our possessions and dignities perpetuated. These "duties shall appertain to that son and his posterity; "and to no one else. Furthermore, you will be careful "to educate him properly, and in due time commit my "possessions and dignities to his care. If you fail here-"in, the sin of neglecting my salvation will be upon you. "I have granted you this license, and am hereby exone-"rated."

ZILLA OF SALEM.

June 12th, 1810.

The deceased, in possession of property, without issue, leaving a widow, and a mother, may either, and which of them, adopt; and whether from another *gotra*, or should the selection be from their own?

Answer of the Pundit.

The deceased's widow may adopt. If she can get a boy of their own *gotra*, he should be preferred: if not, she may adopt from an *annia gotra*, or different family, being still a near relation.

Remarks.

If duly authorized, the widow may no doubt adopt; and is enjoined to give the preference to the nearest relation who is eligible. (See *Dattaca Mimansa.*) But the validity of an adoption actually made, does not rest on the rigid observance of that rule of selection; the choice of him to be adopted being a matter of discretion. C.

The text on which this point of law turns, is, as to its interpretation, more disputed than any other. The readings are various; and what this Pundit has rendered a "near relation," others construe, *not belonging to a distant country.* The general law, however, which

governs the choice of a son for adoption, is, that the adopter may legally take him from his own, or from a different *gotra;* but he ought conscientiously to take him from his own; and, in preference, from his *Sapindas* (or near kindred); or, in default of these, from his *Samánodacas*, or *Saculyas* (degrees of remote kindred). If, however, a person choose to reverse the prescribed order, though he thereby contracts a sinful taint, he does not incur legal animadversion in consequence; and I doubt if it would be competent for the king, at the suit of any person whatever, to prevent the completion of the act;—certainly it could not be reversed, if once performed. E.

ZILLA OF CUDDÁPAH.

May 17, 1806.

Question.

Is the adoption by a maternal uncle of his sister's son legal?

Answer.

If the *Chudam*, and *Upanayana* (tonsure and investiture of the adopted) were performed in the gotra of his adoptive father, then his adoption will be valid, though born in a different one; otherwise, it is irregular.

Remarks.

Adoption of a sister's son is strictly prohibited, unless in the case of Sudras. *Nandi Pandit's Dattaca Mimamsa.*

The parties in this case, it is inferrible, must have been *Sudras.* It is not competent, according to a generally received opinion, for a Brahmin to adopt a sister's son. I have not, however, been able to discover the authority for this; but the reason assigned is, that the relation of the mother, who could not have become the wife of the adoptive father, forbids it.

Since the above was written, I have found sufficient authority for the position, though it be not noticed by Vidyáranga, Vijnyaneswara, or Turca punchánana. It

is from the *Datta Caustab'ha*, and is corroborated by the *Datta Mimamsa of Sri Rama*, a book of some authority in the southern provinces. These two works I have in the college, in one book. I quote, as follows, from the former. "On failure of a *Sapinda*" (a relation who performs obsequies to the same ancestors), "an *Asapinda*" (a remoter relation), "or even one of a "different gotra may be adopted: in that case, however, "a daughter's son, and a sister's son are excepted; "but the daughters' son, or sister's son of a Sudra, "may be taken in adoption. Thus the elder Gau- "tama. Among the three first castes (Brahmins, and the "vest), the practice of adopting a daughter's, or a sister's "son, no where exists." The author of *Datta Caustab'ha* states this as the settled law; but *Sri Rama* allows of an exception. He says, "in distress (*Apadi*), when "no other son can be procured, the son of the daughter, "or of the sister of a man of any of the three higher "classes, and in case of a Sudra universally, may be "adopted." In practice, the adoption of a sister's son, by persons of all castes is not uncommon; the authority above quoted, resting as it does on a single test, and that not pointedly prohibitory, cannot be considered sufficient to vitiate such adoptions.

MASULIPATAM, PROVINCIAL COURT.

July 27, 1809.

Prayaga Venkana - - *Appellant.*
Lachshemg - - - *Respondent.*

The Appellant and the husband of the Respondent being full brothers, the latter, during his last illness, gave instructions to the Respondent to adopt a boy from the family of any his cousins. The Respondent being about to do so, is prevented by the Appellant, the brother of her deceased husband, who insists that she is bound to adopt his son. The objection to this is, that his son having been already invested with the Brahminical string, is consequently no longer capable of being adopted.—Quest. Whether the widow is prohibited by the Hindu law from adopting at her pleasure from the family of any relative of her husband, or restricted to that of the Appellant, and this notwithstanding the objection that is urged by her?

Answer of the Pundit.

The son of the Appellant is adoptible, notwithstandstanding the objection stated.

It is held that Brahmins shall adopt sons from the families of their *Sapindas;* (1) if boys from such cannot

(1) *Sapindas;* those who offer the funeral cake to the same ancestor.

be procured, then from those of their *Sagotras*; (1) never from other families. The meaning is, that they shall prefer the sons of brothers; failing these, they are at liberty to resort for the purpose to that of a distant cousin. To shew that Brahmins are not at liberty generally to adopt boys distantly related, and that it is competent to adopt a brother's son, though invested with the Brahminical string, a test in *Chandrica*, as quoted from *Sareswaty Valasum*, says, "If, among several "brothers by the same mother, one shall beget a son, "the rest are said to be thereby blessed with sons." Whence it may be inferred, that while there is a possibility of adopting a brother's son, another shall not be preferred. In *Datta Mimamsa*, *Sankala* says, "A "Brahmin, destitute of a son, shall adopt a boy from "the families either of his *Sapindas*, or his *Sagotras*." According to which book also, the sons of brothers invested with the Brahminical string may be adopted; and adopting the sons of brothers is most consonant with custom.

Remarks.

The passage cited as from Sareswaty Valasum, or one of precisely similar import, occurs in Menu, ch. ix. 182. Under this, and other texts of law, as generally understood, a preference is to be given to a brother's son; on failing such, a more distant male relation; but not so exclusively as the opinion here delivered seems to

(1) *Sagotras*, those who are descended from the same patriarch.

imply. See Mitacsh. on Inh. ch. i. sect. xi. 13. and note. C.

It is not incumbent on a person to adopt the son of a brother, or other Sapinda. The law merely states this as preferable, but without prescribing it;—certainly it does not give to the Sapinda any right to enforce such a preference, and the Appellant could not, therefore, I am clear, maintain this action: this is the point which the Pundit ought properly to have considered. With respect to the ineligibility of a person for adoption, on whom the *Upanayana* rites have been performed, it is much disputed: the more correct, because the more reasonable opinion, would appear to be, that he is eligible, if of the same gotra (family);—ineligible, if of a different gotra from the adopter; for if of the same gotra, the *datta homam*, though proper, is not necessary: if of a different gotra, the *datta homam* is necessary; and it cannot be performed on one, who, by the rites of the *Upanayana*, has been definitively established in his natural gotra. E.

(1) Vid. post, p 152.

ZILLA OF NELLORE.

By the Pundit.

There being no law to justify the adoption of an eldest son, who has performed the funeral rights of his deceased father, such an adoption will not carry with it the inheritance of the adopter.

Remarks.

Mitacsh. on Inh. ch. i. sect. xi. 12. C.

Right, certainly. An eldest son is forbidden to be given in adoption; but some authorities make exception to this. E.

ZILLA OF NELLORE.

By the Pundit.

If a man having two brothers, who have each an only son, adopt his wife's sister's son, and die, such adopted is entitled to his property, the adoptive father's nephews being only sons, not being eligible to adoption.

Remarks.

Only sons not being eligible, (Mitacsh. on Inh. ch. i. sect. xi. 11.) a more distant connexion might in this case be selected with perfect propriety; notwithstanding the preference due in other circumstances to a nephew. (Ibid. § 636.) C.

The adopted wife's sister's son is certainly, in this case, entitled to the estate: but the *taking* in adoption a brother's only son is not forbidden; the *giving* is, except as has been before seen, in *times of calamity*.—Ante, p. 91. E.

ZILLA OF NELLORE.

By the Pundit.

If a man have no male issue of his own, it is stated in many books that he may, under the pressure of distress, adopt the only son of a brother.

Remarks.

If a brother's only son be adopted, he need not be taken away from the family of his natural father, but may continue to perform the offices of son, both to him and to his adoptive father. See notes to Mitacsh. on Inh. ch. i. sect. x. 1. and sect. xi. 32. A valid adoption of an only son cannot otherwise be made, the absolute gift being forbidden. (Mit. on Inh. ch. i. sect. xi. 11.) C.

Apadi, or *Apatcalé*, in distress, or in time of distress, is frequently assigned as a reason for similar exceptions. If, by reference to it in the present instance, it be meant that the adopter shall take his brother's only son, only when necessitated to do so, by not being able to procure any other person for adoption, the Pundit has, I think, confounded the taker and the giver; for it is the latter that the law contemplates as being compelled by his necessities to part with his only son. It is the opinion of some, and is entitled to attention, because it is founded in reason, that where the son of a

brother, whether an only son or not, exists, here is no necessity for adoption. It is supported by *Menu*,(1) who declares that, if among many brothers, one beget a son, this single birth has the same spiritual effect, as if they had all become fathers. He is, in fact, *put-tra*, drawing (*trayati*,—trahit) each from (*put*) purgatory. The point is scarcely worth further discussion, the undoubted law in this, as in all other cases of adoption, marriage, &c. being,—that if the act be duly completed, it cannot be reversed. E.

(1) Ch. ix. v. 182.

ZILLA OF COMBACONUM.

Sadaseva Pillay, *v.* Vadaganada Pillay.

Upon a question of adoption, the Pundit certified that it was good, though oral, and the adopted at the time an adult, being a brother's son.

Remarks.

See Mitacsh. on Inh. ch. i. sect. xi. 13. A difference of opinion prevails in regard to adoption of adults, or persons for whom certain ceremonies termed *Sanscara* (marriage of Sudras, and tonsure of the higher tribes) have been performed, the prevalent doctrine, in most parts of India, being adverse to it. The objections are less forcible in the instance of a relation of the male side, than in the case of a stranger. C.

Correct,—as seems to me. E.

ZILLA OF VENDACHELLUM.

April 29, 1808.

Sree Mootum Ramanoojyungar, *v.* Appooyungar.

The Plaintiff is the adopted son of a woman of the name of Janika Ammal, being the son of her elder brother's daughter, the *Upanáryana* of the boy having been subsequently performed in the house of his *natural* father, where he continued to reside. The Defendant is her *Cama puttra*, or illegitimate son, fostered and brought up by her, previous to the adoption of the Plaintiff. Subsequent to the adoption, she conveyed away her property to her illegitimate offspring, by a deed disclaiming the Plaintiff as her adopted. She being since dead, 1. Quest. Was the adoption of the Plaintiff invalidated by the performance of the Upanayanum, and the residence of the adopted, in the house of his natural father?—2. Could the deceased disclaim the adoption?—3. To whom does her property descend?

Answer.

The adoption is not affected either by performance of the Upanayana in the house of the natural father, or by the residence there of the adopted; nor could the deceased in her life, by any act, disclaim at her pleasure the son she had so acquired. Her property descends to her adopted.

Remarks.

Adopted sons, being duly initiated by the adopter under his own family name, become sons of the adoptive parent. (*Cálicá purána.* See Mitacsh. on Inh. ch. i. sect. xi. 13.) The Upanayana, though performed in the natural parents' house, if done with the family name of the adoptive one, would not be irregular. It can be of no consequence where it takes place, only it must be performed in the name of the adopter's *gotra.* The adoption cannot be affected by the residence of the adopted, which can but raise presumption as to the fact:—being once completely and validly made, it cannot be recalled. A natural child being excluded from the rights of a son, and none being now allowed, but legitimate issue, and adopted sons, the adopted in this case, if regularly so, was the heir. (Mitacsh. on Inh. ch. i. sect. xi. 21.) Education and nurture do not constitute any relation entitling to inheritance. C.

The question is not, whether an adoption could be dissolved; but, whether Janike Ummal could possibly have any right whatever to adopt. Certainly, a Brahmin widow (as, from the name, this woman must have been) cannot adopt, without the consent of the husband, obtained before his decease; and it nowhere appears here that such consent had been given. Again, this woman could convey no right to the estate of her husband, either by adoption, or any other act; as she must have forfeited her own right, by the impurity of

her conduct; nor could she convey right to any separate property of her own by adoption, a Brahmin woman having no power to transmit such property, which must descend, as fixed by law. E.

It does not appear that Janike was, or ever had been, a married woman. The contrary is rather to be presumed. According to the facts, as stated, the adoption would seem to have been a spurious one; and, in this view, the case, including the remarks upon it, is valuable only for the *dicta* it contains.

T. S. S.

ZILLA OF CHINGLEPUT.

May 21, 1803.

The father of a family, who had no male issue, having maintained for a long time a young lad, whom he had intrusted with his affairs, and professed to have adopted, of which evidence existed in writing, but which is lost, adopted another—Is the latter adoption valid?

Answer of the Pundit.

If one maintain another for a length of time, professing to have adopted him, and in fact committing all his affairs to his charge, having, upon his beginning to do so, invited and entertained his relations, acquainted the magistrate, and drunk manjanee, he cannot afterwards abandon the young man so adopted, in favour of another; nor is the adopted compellable to renounce the connexion so formed. The relation of adopted needs no writing for its support.

Remarks.

The answer presumes the adoption to have been actually made; and the circumstances stated authorize the presumption. It would be otherwise, if it were proved that the party had changed his intention be-

fore the essential rites of adoption took place, and purposely avoided performing them. C.

This opinion is correctly applicable to all Castes but Brahmins, with whom the *Datta-homam* is indispensably requisite to produce *spiritual* benefit. E.

ZILLA OF VENDACHELLUM.

May 5, 1808.

Siliamedoo Runga Reddy, *v.* Achummall.

Question to the Pundit.

Narasummall, the widow, and her mother-in-law the Defendant, entered into an agreement to adopt a particular boy; but the intended adoption not taking place, the widow, without the privity of her mother-in-law, subsequently adopted the Plaintiff. Is an adoption, so circumstanced, good, notwithstanding the previous agreement?

Answer.

It is.

(Signed)
SREENEVASA CHERLOO, *Pundit.*

Remarks.

A simple agreement to make an adoption, not carried into effect, will certainly not invalidate a subsequent adoption, made with the requisite forms. The adoption of the widow was good, if authorized by her husband, or, in default of such authority, if with the requisite sanction of her proper guardians, her husband's male kindred. (Note on Mitacsh. on Inh. ch. i. sect. xi. 9.) C.

This appears perfectly correct, admitting either that the consent of the husband to adopion by the wife had been obtained before his decease, or that such consent is not necessary, where the parties are of a Sudra tribe. E.

ZILLA OF VIZAGAPATAM.

Question to the Pundit.

Among the twelve sorts of sons, are not the *Dwyamushyayana*, &c. disqualified from inheriting in the present age? And, can any inherit in it but the *data* and *ourasa*, the adopted and the legitimate, natural born?

Answer.

The right of inheritance is restricted in the *Caliyug* to the two descriptions of sons specified in the question, in exclusion of the other ten.

PUNDIT APPISH, *Sastree.*

Remark.

The "*Dwyamushyayana*," or son of two fathers, is a son begotten by an appointed kinsman. The practice is by most authorities admitted to be abrogated in the present age; yet it continues in all parts of India. Such a son succeeds to both fathers. Vijnyaneswara (it must be observed) admits the legal existence of the Dwyámushyayaná in this age. The appointment of a wife, or widow, to raise up seed he considers as forbidden by Menu, and consequently unlawful; and the term *Dwyámushyáyana* therefore is restricted by him to the son of a virgin, betrothed, but not espoused, whom his author, Yajnyawaleyn, directs to be espoused

by the brother of the intended husband deceased. Such a son he deems legitimate; he is, according to him, *Dwyámushyáyana*, or the son of two fathers; and he succeeds always to the estate of the brother to whom his mother was betrothed, as well as to that of his actual father, if the latter have no other son. If the latter have male issue distinct from him, he is then not *Dwyámushyáyana*, but simply *Cshétraja*, son of the wife, and belongs exclusively to him to whom his mother was betrothed. As the custom of a brother marrying the betrothed of his deceased brother does not now prevail, the distinction made by Vijnyaneswara is of no practical utility. It is certain, however, that he considered the offspring of such marriage as legitimate; and he no where intimates that any of the other descriptions of sons became illegitimate in the *Cali-Yugam*. This is a fancy posterior in time to Vijnyaneswara. E.

ZILLA OF BELLARI.

June 9, 1808.

Hanumunta Bhutloo, *v.* Bhyrapah.

According to the Plaintiff's petition, one *Bhagavendra Bhutloo*, of the Bhargava gotra, some forty years ago, adopted the Plaintiff, then three years of age, being of a different gotra. It is stated, that his Upanayana, with every other corresponding ceremony, was performed for him in the gotra of the adopter; that his adoptive father dying a few years after, his funeral rites had been celebrated by the Plaintiff, who had, from that time to the present, enjoyed his property, with the privileges of an hereditary office (that of *Panchangi* (1) of his village) which had belonged to him. It farther states, that the time being arrived for the performance by Plaintiff of his son's Upanayana, the Defendant, being of the family of Bhagavendra, though separated from it in point of property, disputes its being performed in the adoptive gotra, insisting on its performance in his Janaca gotra, or the gotra of his natural ancestor.

The Defendant, by his answer, denies any adoption of the Plaintiff by means of *homams*, as well as the performance of his Upanayana by his alleged adoptive father, *Bhagavendra Bhutloo;* and he alleges, that the

(1) Expounder of the *Panchagum*, or almanack

celebration of the funeral rites of the latter by the Plaintiff was objected to at the time, by the ancestors of the Defendant. He then quotes a passage from the *Datta Mimansa* of Nandi Pandita, to shew that, if one of a different *gotra* from the adopter be adopted, his sons should revert to their parents' natural *gotra;* according to which authority, he justifies the opposition complained of by the Plaintiff. The uninterrupted possession by Plaintiff of the property and privileges of his alleged adoptive father is admitted by the Defendant.

The question is, whether the *Upanayana* for the Plaintiff's son should be solemnized in his adoptive, or in his natural *gotra?*

Answer of the Pundit.

Adoption is of two kinds, viz. *Nitya Datta,* and *A-nitya Datta.* The former, performed with *homams,* or offerings before fire, is permanent; the latter temporary only, being without the same formalities. The *Nitya Datta* is the preferable one, and, in the case of the son of one so adopted, his *Upanayana* should be performed in the *gotra* of his adoption. The *Upanayana* for the son of the *A-nitya Datta,* or temporarily adopted, is allowable either way; *i. e.* it may be performed in his adoptive *gotra,* or in that of his ancestor's original birth. It appearing, in this case, that the adoption of the Plaintiff was by *homams,* in the presence of relations and of the god, his son's *Upanayana* should be solemnized in *Bhargava gotra,* being that of his adoptive father.

Remarks.

No doubt, the issue of an adopted son, of the description termed *datta*, regularly adopted, belongs, like him, to the same *gotra* with the adopter: and the ceremonies of initiation (*Upanayana*) are to be performed in that *gotra*, or family. I am not aware of any authority for holding that the issue of an *Anitya datta* may be initiated in either family. An adoption, which renders the party son of two fathers *(dwyámushyáyana)*, is not unknown to the law. (See Mitacshara on Inh. ch. i. sect. x.) But, in such case, the issue remains in the same *gotra*, in which the son of two fathers received his *Upanayana*, or initiation. C.

This opinion is sufficiently correct. *Nitya datta*, and *Anitya datta*, distinctions made by some writers, are not improperly interpreted into permanent and temporary adoption. The *Nitya datta* neither returns himself, nor do any of his descendants return to the *gotra* of his natural father, but remain from generation to generation in that of the adoptive one. The *Anitya-datta* does so return. He that is so adopted indeed remains, while he lives, in the *gotra* of his adoptive father; but his son returns to his original one. Describing the *Anitya datta*, Vidyaranga quotes the following text from the *Nernaya Sindhu*. "That son to whom the "prescribed ceremonies have been performed in the "*gotra* of his natural father, as far as the tonsure, does "not possess the full qualities of a son—he is a tempo-

" rary son only" *(Anitya datta)*. The author quotes one of the *Vútiam* of *Satyáshádha*, which states the *Anitya putra* to be equivalent to the *Dwyámúshyáyana*, or son of two fathers; and hence it follows, that he is to perform the funeral ceremonies of both fathers, the natural and the adoptive.

The result is, that *Nitya-datta* is a son adopted from the same *gotra*, before, or after the ceremony of the tonsure; or a son adopted from a different *gotra*, *before* the tonsure; *Anitya datta* is a son adopted from a different *gotra*, *after* he has received the tonsure in his natural *gotra*. The performance of the tonsure is the cause of the temporary nature of the latter species of adoption. E.

ZILLA OF VERDACHELLUM.

Nov. 14, 1807.

Vasuntaroya, *v.* Kistruyer.

The Defendant is sued upon a bond given by his natural father, being one of several sons who was given in adoption to a person not a party to the bond. The other sons, including the eldest, are living.—Is he liable to the action?

Answer.

An adopted is not liable for a debt contracted by his natural father.

(Signed)

IREENAVASA CHURLOR, *Pundit.*

Remarks.

Being no longer connected with the family, nor concerned in the estate of his natural father, (Mitacsh. on Inh. ch. i. sect. xi. 22.—Menu, ch. ix. 5. 14.) he cannot be held liable for his debts. C.

To the same effect by E.

ZILLA OF CHINGLEPUT.

M. Veneataroyer, *v.* Agusteapah Moodely.

The Plaintiff sues for a debt due to him from Defendant's son, Soorbaroya Moodely, who was long since given in adoption to Annah Moodely.—Is the action maintainable against the Defendant?

Answer.

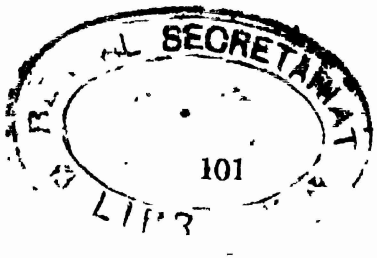
The money borrowed by Soobaroya Moodely is not recoverable from his natural father, the Defendant, but his son will be answerable for it when he comes of age; unless it was borrowed for the use of the Defendant or his family, in which case the action is maintainable against the Defendant. (1)

Remarks.

This follows naturally from the entire separation of the son given for adoption from the family of his natural father. Mitacsh. on Inh. ch. i. sect. xi. 32.

C.

(1) On the ground of the debt having been contracted by the adopted, not as a son, but as the agent of his natural father. This must be supplied, to give the full meaning of the sentence.—The opinion is correct. E.



ZILLA OF BELLARI.

Dec. 13, 1808.

Nursapah, *v.* Paupummall.

Upon a question of adoption, the Pundit of the Court reported as follows:

Answer.

It is held that, if a lad be adopted into a family, even where it is not the custom to perform *homam* (sacrifice of adoption), he cannot be turned out of it at will. Adoption imposes upon the adopter an obligation to educate and provide for the adopted as his son, and he succeeds as such upon the death of his adoptive father.

Remarks.

The inadvertent omission of an unessential part, as sacrifice is, even where it is enjoined, does not vitiate an adoption. 3 Dig. 244.

The adoption being complete, it cannot be annulled. An adopted son may be disinherited for like reasons as the legitimate son.—(Mitacsh. on Inh. ch. ii. sect. x.) but he cannot forfeit the relation of son. C.

Certainly:—however defective the ceremony, and however small in consequence the spiritual benefit, the act of adoption cannot be set aside, on any account whatever; *a fortiori*, not on account of any informality.

E.

ZILLA OF VERDACHELLUM.

Dec. 30, 1807.

Raman, *v.* Cootya Padayanchee.

The Plaintiff having been adopted by a woman, had she, subsequently, the same dominion over her property that she had before, so that a mortgage of a house by her after would be good?

Answer.

The mortgage under these circumstances would not be good, to the prejudice of the adopted, if rightly adopted.

Remarks.

Presuming the property here spoken of as the woman's to have been what devolved upon her by the death of her husband, and not to have been her proper *Stridhana*, it ceased to be her's at the moment of a valid adoption made by her of a son to her husband and herself; in the same manner as property, coming into the hands of a pregnant widow, by the same means, cannot be used by her as her own, after the birth of a son. An adopted child is in most respects precisely similar to a posthumous son. From the moment of the adoption taking effect, the child became heir of the widow's husband; and the widow could have no other authority but that of mother and guardian. C.

Women have legally no right to adopt for the transmission even of their separate property; and this is founded both on authority and reason; it does not follow, however, but that such a custom may obtain in the caste to which the parties in this case appear to belong, namely, that of the *Puller*, nearly the lowest of the Sudra tribes. E.

ZILLA OF VIZAGAPATAM.

Question to the Pundit.

If a boy that has been adopted die without issue, and unmarried, what becomes of the property of his adoptive father at his death? Does it go to the natural father of the adopted, or to the widow of the adoptive one?

Answer.

The widow succeeds to it by inheritance, as *legal* mother to the adopted.

(Signed) *Pundit* APPIAH, *Sastree.*

Remark.

The answer is entirely consonant to the law. The *dattaca* having been given away by his father, the natural relation was annulled, and his father would no more inherit from him, than he from his natural father.

C.

MAUSULIPATUM, PROVINCIAL COURT.

November 3, 1803.

Cooty Verty Cootapah, *Appellant.*
Sambiah and Venkiah, *Respondents.*

Questions referred to the Pundit of the Court.

1. Is it proved by the evidence given before the Zilla Court, that Basavannah, the father of Cootapah, the Appellant, was adopted by his maternal uncle, Moonta Satia Lingum?

Answer.—The adoption is not established, for want of the oblation to fire.

2. Is the declaration by a husband to his wife, that he had adopted a particular boy, sufficient evidence, if proved, of the fact?

Answer.—The husband not being at liberty to adopt, without the privity of his wife, a subsequent communication would not be sufficient to establish the fact of adoption.

3. Is it necessary for persons of the Sudra caste to make the oblation to fire, in adopting?

Answer.—It is ordained that the husband and wife, among the Sudras, should be present, and that they should cause a Brahmin to make oblation to fire.

(Signed) V. NARRAIN, *Sastree.*

Remarks.

" As to oblation to fire, the ceremony is prescribed; but the fact of its celebration may be presumed, if there be no proof to the contrary. The inadvertent omission of a ceremony would not invalidate the adoption. (Jagannatha's Digest, vol. iii. p. 244.) The wife must consent to the gift of a son; but it is not said that she must be privy to the acceptance of one.—See Mitacsh. on Inh. ch. i. sect. xi. 9. and the note on the words " whom his father or mother gives." A subsequent communication to the wife would be evidence, but not conclusive. As to the third point, the answer of the Sastree is the received construction.—See Jagannatha, vol. iii. p. 262. But the learned of Mit'hilâ contest the position." C.

The former of these answers, if (as by their names they appear to be) the parties in the cause are Brahmins, is correct. Not so the last; for the *Sastree* does not ordain that the oblation to fire should be performed by any one at a Sudra adoption, and this for sundry good and sufficient reasons. E.

ON THE LEGALITY, IN THE PRESENT AGE, OF THE CRITA, OR SON PURCHASED FOR ADOPTION.—Mit. on Inh. i. xi. 16.

Extract of a Letter from Henry Colebrook, Esq. to Sir John Royds, dated Calcutta, March 14, 1812.

ACCORDING to the ancient Hindu law, purchase was one of the means by which a son might be had ready made. This easy way of getting a family is noticed in Menu, in Jagannatha's Digest, and in the Mitacshara; and some remarks on the law relative to it will be found quoted from other authorities, in the notes to the translation of the last mentioned work. It will be there seen, that the child so adopted must be of the same tribe with the purchaser, and a younger son of the seller; and the purchase must be expressly for the purpose of a son. No set form, nor any further condition seems to be requisite; but the adoption is *by* purchase, not *after* it. I dwell on this point, because I gather from Sir Thomas Strange's questions, that, in the case before him, the purchase is not shewn to have been made specifically as of a son. Sir Thomas asks, whether adoption may grow out of purchase, and whether purchase can *per se* entitle the child to consider himself as adopted? To these questions I should answer,

certainly not. The buyer's actual design to *buy a son* must be shewn to have existed at the time of the purchase; though no doubt presumptive proof of such concomitant will may be admissible, if direct evidence be unattainable.

On this side of India, adoption by purchase is obsolete, and considered to have been prohibited in the present sinful age of the world. The only practice analogous to it is the purchase of children by *Gosains*, *Sannyasis*, and other professed ascetics, for initiation into their order of devotion,(1) the disciple becoming the heir of the master. This however is not adoption, but a practice grounded on other provisions of the Hindu law, and on the peculiar customs of the mendicant tribes.

The *Datta Mimâmsa* is no doubt the best treatise on Hindu adoption.

I observe in books which I understand to be of most authority at Madras (for instance, the *Smriti Chandrica)*, the prohibition of adoption by purchase is asserted. I imagine this mode of adoption must be obsolete there, as well as here.

(1) See Digest, iii. p. 276.

Extract of a Letter from Sir Thomas Strange to Henry Colebrooke, Esq., Calcutta, dated Madras, April 29, 1812.

Sir John Royds was good enough under date the 15th of March, to send me your letter to him of the 14th, on the legality, in the present age, of adoption, among the Hindus, by purchase. My application to Sir John for information on the subject had reference to a cause depending in our Court. Your letter did not arrive till after the trial, with the substance of which you are about to be troubled. But I must request you first to excuse this direct address, without permission or warrant; a liberty which I can alone justify to myself, under the sanction of my friend Sir John, who will suppress my letter if it be improper, for which purpose I transmit it through him open.

The action was trespass by widows, against the young man claiming to have been adopted by their deceased husband. The question arose upon the justification, on which the Court thought that he had failed. But it was not so confident of this, as not to be open to conviction, upon an application to set aside the nonsuit that had been obtained, for a new trial; a rule for which having been granted, toward the close of our late term, and cause being to be shewn against it in the next, it will be desirable to be as well prepared as possible when it comes on again. With this view the

liberty is taken of thus troubling you on the occasion. Assuming the practice to continue legal in the Peninsula, you seem to think that though the transaction purports to be that of a mere sale and purchase, yet the design might be shewn by evidence; and I conclude your opinion to be, that adoption appearing to have been the object, the boy purchased would be entitled to be considered as a son. Though we had not the benefit of your judgment to guide us at the time, yet, averse to the exclusion of light, we admitted, as explanatory, an account of what was said to have passed at the time of the signing of the bill of sale, as well as of the acts of the deceased under it. Such evidence, upon the principles of our law, would have been liable to question; and, in fact, the counsel for the Plaintiffs reserved his right of protesting against it in the case before us, in the event of the verdict being against his clients. Enclosure B(1) is an extract of a letter which I wrote soon after to a judicial friend in one of our provincial courts, with a view to his conferring with his Pundit on the whole of the subject, and letting me know the result. I add it, as elucidatory of the trial. Our idea finally was, that, whatever had been in the contemplation of the parties, adoption never had in fact taken place, unless purchase was to be considered as constituting it. I have an opinion given in 1808, by the Pundit of the Zilla Court at Verdachellum, that an agreement to adopt is not an adoption;

(1) Post, p. 115.

and, in that case, he held a subsequent adoption of a different boy to be good.

In the case under consideration, it was insisted for the Defendant, that the purchase was an adoption, on the ground that otherwise it must constitute *slavery*, the existence of which by law the Court would not recognize, and, at all events, not in the caste of the Banyans. If slavery be competent by the Hindu law, there was no evidence before us of sufficient force to exclude the possibility of it in the Banyan caste. That slavery exists by the Hindu law, cannot, I think, be doubted. I have opinions that it does from living Pundits; and Sir William Jones (it is observable), in one of his charges, delivered June 10, 1785, however reluctantly, admits the fact, contending that it ought not to be tolerated but in a mitigated form; though, in the conclusion, it is true, he represents the sale of the human species as a traffic that had been condemned by the most respectable Hindus in Calcutta, as repugnant to their Sastra. Supposing the evidence which we received to have been admissible, there seemed reason to believe that adoption had been in the contemplation of the parties; but, as it did not appear to have ever taken place, and as we did not conceive that the claim could stand upon the purchase alone, though coupled with an intent, such intent not appearing to have been otherwise ever carried into execution, we disallowed it, reserving, if necessary, the general question of the validity, at this day, of adoption by purchase.

Upon this point, I have had some correspondence

since with Mr. Ellis, collector of Madras, whom I believe you know by character. He is personally known to Sir John Rayds. Enclosure, letter C(1) contains extracts from it. He seems to incline to the opinion, that the mode is still valid in this part of India, excepting only among Brahmins. The text of the *Smriti Chandrica*, according to the extract accompanying one of his letters, declares it generally obsolete. But a reference to the *Datta Mimamsa* (it seems) confines the prohibition to the *twice born*, which Mr. Ellis says must be taken now to mean only Brahmins. This remark is made in a "note," which I take to have been furnished by some of Mr. Ellis's people; it may be of questionable authority. I have consulted the Pundits of several Courts upon the coast; who, speaking (no doubt) with reference to the Peninsula, say, that it is not now legal, without entering into distinctions.

The *Mitaschara* (the prevalent authority with us) is silent upon the point, though it contains a chapter expressly on the subject. Permit me to draw your attention to this, since (as was to be expected) it was relied upon in the case before us, in favour of the Defendant. Admitting the practice to have been abrogated in your part of India, it was contended, on the authority of the *Mitacshara*, that such was not the case here. I have already had occasion to observe, how Mr. Ellis, between reference and construction, avoids the authority of the *Smriti Chandrica*, which, without reserve or distinction, restricts inheritance in the *Cali-yug*, to the son of the body, and the son *given*.

(1) Post, p 123

Translation of Bill of Sale, dated Shawcna Bahoola Astamy, or 21st Auvany of Caulayoocty year, answering to A. D. September 1, 1798;—*referred to in Letter to Mr. Colebrooke, ante,* p. 109.

I, Bavoory Chitty Vencataraumoodoo Chitty, and my wife Lutchemy, both of us, do jointly give this bill of sale to Jaldoo Sorbaroya Chitty, of Madras; that is to say,

We have sold to you our fourth son, or boy of four years of age, named Pedda Chinnacasavaloo, for the sum of (25) twenty-five star pagodas, current money of Madras; and having received the money, you have consequently a right to the boy; henceforward we have no connexion with him; you are to keep him according to your pleasure. There can arise no claim or controversy between us respecting him; should there occur any, we bind ourselves to release it, and to confirm him to you. In default whereof, we hereby engage to repay you the said principal sum of twenty-five pagodas with interest, together with the charges you may have incurred for him from this date. Thus have we both voluntarily given this bill of sale. Witnessses, Tagooramoody Chinnasamiah, Voopatoory Appana Chitty, Mandauroo Govindo Chitty, and

Chinne Vencapa Chitty, with whose privity this bill of sale is drawn by Madary Soobarcyloo.

(Signed)

BAVOORY CHITTY VENCATARAUMOODOO.

Witnesses,

TAGOORAMADOO CHINNASAMY,
VOOPATOORY APPANAH,
GOVINDO,
CHINNA VENKIAH.

(Signed)

RANGANADOM, *Court Interpreter.*

[A true translation, as near as can be, from the Gentu language.]

Questions.

1. Is adoption by purchase legal in the present age, according to the Hindu law?

2. Supposing it to be so, does purchase alone constitute it?

3. If not, can it grow out of purchase, supposing adoption to have been intended, and the boy purchased to have been treated by the purchaser as his adopted?

4. Is B, according to the case as stated, to be taken to have been adopted, so as, A being dead, to be entitled to succeed to his estate, by right of adoption.(1)

(1) For answers to the above questions, vid. post, p. 129.

B.

Extract of a Letter from Sir Thomas Strange, dated March, 1812, *referred to in Letter to Mr. Colebrooke, ante,* p. 110.

I EXPECTED from you, before this, the extracts you were so good as promise me from the Shaster, on the subject of adoption by purchase. In the mean time, our term having commenced, the cause in question has been tried and disposed of, subject to the right of the losing party to call upon us to review our opinion. The action was brought by two widows against the Defendant, who claimed as the adopted son of their deceased husband. His case was, that he had been purchased by the deceased some years ago of his natural parents, who had sold him on account of distress, for twenty-five pagodas; having previously disposed of two others in the same way, under similar circumstances. There was a deed executed on the occasion, of which I enclose you a translation. The mother of the boy swore that adoption was the object; that he had been bought and sold to be adopted, and that otherwise no consideration earthly would have induced her and her husband to have parted with him. Her husband did not attend, being said to be ill as well as aged; living at the distance of about thirty miles from Madras. There were other witnesses, who swore to the same effect, as to the intention and view with which the purchase was made; and it was proved that the boy

had been so far treated as a son, that he had been dressed, and ornamented, and sent to school as one; and had also accompanied the deceased on a pilgrimage, and had occasionally visited and been seen by his friends here, so dressed and adorned. It was further proved that, upon marriages, in the caste to which the parties belonged (being that of Banyans), it was the custom for an officer of the caste, employed for the purpose, to carry balls of rice about to each family. That the practice was to give four balls to the head of each for all the members of his family (as contradistinguished from his servants), or eight, if he happened to be one of the monthly members of the caste. The deceased was a monthly member, and had had eight upon these occasions. There was a servant in the family to whom the *Oomadee* (for so he is called) used to give four on the same occasions. It did not appear whether, had there been more in it, each would have received four, or whether four was the customary provision for all the servants. It was proved that, upon the young man in question becoming an inmate of the house, which he did at the age of about five, it made no difference as to the number of the balls given to and received by the deceased; inferring (as contended for the Defendant), that he had been considered as his son. It was admitted, that no ceremony of adoption had taken place, at the time of the purchase, or after; as also, that, in the other two instances of sales by the parents of the boy in question, the regular ceremonies of adoption had followed. It was not pretended that the deceased

had ever called the boy his son, or introduced him to any one as his son; or that, in the space of fourteen years down to his death, there had been any transaction or communication whatever between him and the parents of the child, subsequent to the execution of the bill of sale, from which adoption could be inferred, as an act distinct from what might be considered as resulting from the treatment of the boy, coupled with the bill of sale. It appeared that, in the latter part of his life, the deceased's regard for him had ceased; that he had stripped, and occasionally punished him with ignominy; and finally left him to seek protection from another member of the family, for whom he had, in consequence of a misunderstanding, been recently providing a separate maintenance.

The Court agreed with the counsel for the Defendant, as a general proposition, that adoption was indefeasible, inasmuch as it deprives the adopted of the rights belonging to him in his natural family, and consequently that having once taken place, it was not competent to the person adopting, capriciously, by any act of his, to deprive the adopted of his acquired rights, incident to adoption. But it thought that, under the circumstances of this case, the Defendant could not be considered as having ever been adopted. It took it, that the transaction having been reduced to writing at the time, it might be expected that adoption should appear upon the instrument, if such had been really the object; more especially, as it was not pretended, that any thing in the nature of adoption had followed its ex-

ecution; since, otherwise, it would be to turn that which purported to be a mere dry bill of sale, into an instrument of a very different description, contrary to what the Court could, with any thing like confidence, see had been in the contemplation of the parties at the time; and that the danger of the interpretation contended for was the greater, in a case in which the claim was set up after the death of the owner of the estate, and person whose obsequies were to be performed, and attempted to be supported principally by the evidence of the mother of the boy, who had a manifest interest in getting it established. The Court was aware that, by the Hindu law, it was more than doubtful, whether the mother was admissible in this case; but the English law is not so rigid in its admission of witnesses; and, though we attend to their laws in matters of inheritance and contract, where natives are the parties, yet, so far as evidence only is concerned, we in general administer justice to them, in the Supreme Court, upon our own principles. Be the mode of adoption what it might, this seemed indispensable; that, at whatever time it was contended to have taken place, it should be shewn by the claimant, that the operative expressions had been used, indicative of the disposition to give, or to become adopted on one side, and to adopt on the other. The Hindu law has not prescribed any particular expressions on the occasion; nor does it require that adoption should be by writing. But it has provided, that the intent shall be expressed at the time; and, if the transaction be by writing, its whole genius and course

teaches us to look for it there. Neither is the performance of ceremonies essential to the validity of adoption, as conferring civil rights; and the want of them therefore could not be pleaded in bar to a claim of this nature; but it is undeniable that, with reference to it, considered as a merely civil transaction, they are of infinite consequence in point of proof; and it follows, that whoever insists upon a claim of the kind, has a difficulty in point of evidence to get over, no ceremonies appearing to have been performed; especially if the claim (as in the case before the Court) was founded upon a writing, from which it is far from being to be collected, that adoption had been in view. That there is a ceremonial for adoption by purchase, as well as for other modes of adoption, see the Mitacshara, p. 312. (15.) It had been contended by the counsel for the Defendant, that the Court would presume any thing, and lean to any construction, rather than admit that a boy had been sold to be a slave, which it was also asserted was illegal in general, and without precedent in his caste. The Court, in answer to this said, it did not know that slavery was illegal by the Hindu law, in times of distress; but that, at all events, the practice was too notorious to admit of an argument being drawn from its illegality, against its existence in a particular case; that the question for the Court to decide was, whether the claim to *adoption* had been supported, in opposition to the claim on the part of the widows, which could not otherwise be disputed. That if it were not, the boy still remained the child of his natural pa-

rents; he could perform their obsequies; he would be entitled to share their estate, if they had any; and that, so far, no injury had been done him. That, should the widows insist upon other rights, and be advised to institute a claim against him, founded on the bill of sale, considered as a mere and absolute transfer of him to their deceased husband, it would then be time enough to inquire into its validity as such, and declare its legal effect.

Upon these principles, it seemed to the Court, that the fact of an adoption by purchase had not been made out, so as to raise the question of law meant to be agitated, as to the legal validity of such an adoption; and, upon these grounds, the claim of the Defendant was dismissed, without calling upon the widows to go into evidence to repel it. The trespass was proved, and the question arose upon the justification.

Had the deed purported to have been a deed of adoption by purchase, or could we have seen that such was its effect, the question remained, whether there can be an adoption of the kind, by the existing Hindu law.

The authority of the *Smriti* is express, that the filiation of any but a son legally begotten, or given in adoption by his parents, is a part of ancient law abrogated in the Cali age. See "General note" at the end of Menu, 6th ed. p. 365. It is said by Sir William Jones (same page), but not speaking of this text in particular, that the *Smriti* is quoted, without the name of the legislator; and, of all the prohibitory texts collected and arranged in that note, he remarks that none of them, ex-

cept that of Vrihaspati, are cited by Calluca Bhatta, his favourite commentator.(1) Vrihaspati then is admitted to be an authority, having received the sanction of Calluca. But Vrihaspati (in *loc. cit.*) mentions the distinction between the three first ages and the fourth, with reference to the mode of acquiring sons; observing, "Thus were sons of many different sorts made by an-"cient sages; but such cannot now (he says) be adopted, "by men destitute of those eminent powers."—Is it not most reasonable to think, that he meant should be understood here, what is by others more distinctly expressed, namely, an interdiction, in the present age, of all but the son lawfully begotten, and the son given in adoption, *i. e.* the chief of each set, according to a distribution made by some of the Hindu Jurists, into sons proper, and improper; in other words, sons by birth, and sons by adoption? The *Adityapurana* is equally express on the subject with the *Smriti*. See Dig. vol. iii. p. 272. 8vo. ed. sect. viii. "*On the Son given;*" and, I think, subject to other lights, we must consider the law as well summed up under the title "On the Adoption of Sons;" sect. xv. p. 289, same vol. where it is stated that "among these twelve descriptions of sons, "we must only now admit the rules concerning a son "given in adoption, and one legally begotten;—ob-"serving that the law concerning the rest has been in-"serted, to complete that part of the book; as well as "for the use of those, who, not having seen such prohi-"bitory texts, admit the filiation of other sons."

(1) See preface to Menu, p. 14.

I have troubled you a good deal; and had no idea when I sat down of saying so much on the subject. After all, I have given only the outline of a long trial; though I do not believe I have omitted to mention any material circumstance. I wish you could be at the pains of stating to your Pandit (by way of conference) what I have said, and of letting me know how far he thinks we have been right, if you have sufficient confidence in him for such a communication.

C.

Extracts of Letters from Mr. Ellis of Madras, to Sir T. S. referred to in Letter to Mr. Colebrooke, ante, p. 112.

NEITHER Vijnyaneswara nor Jimuta Vahana (a translation of whose work also you have got) make any very particular mention of sons purchased. They enumerate the twelve descriptions of sons in the usual way, and make the customary distinction between those who are heirs, and kinsmen; and those who are heirs, but not kinsmen; among the latter is included the son purchased: so that the right of succession in this description of son is fully admitted by these authors. Vijnyaneswara prescribes a certain ceremony for adoption, such as assembling kin, informing the king, &c., which he states as equally to be observed with respect to a son purchased.

In the Digest, translated by Mr. Colebrooke, Jagannatha states (I believe) that, in the present age, certain descriptions of sons, and, among the rest, the son purchased, are not lawful. He is at variance here with the above mentioned authorities, and with practice; for, with some castes in this part of India, the mode of adoption is uniformly by purchase. Among others again, the Brahmins for instance, this and other modes are not customary. Jagannatha's statement, therefore, should not be received without limitation.

I am afraid you will think me negligent, in not sending you before the extracts I promised respecting the son purchased; it has arisen wholly from my not having been able to procure a perfect copy of the Smriti Chandrica, until Saturday.—My copy of the Madhavijam I have mislaid; and I cannot find another at Madras; but I have, beside the Smriti Chandrica, made extracts from the Datta Mimamsa, and other works within my reach.

The principal point in question respecting the son purchased, namely, whether the act be lawful in the present age, is not made very clear by these extracts; though, taking them altogether, the inference seems to be, that it is forbidden to Brahmins only. This depends on the meaning of the word *Durjate* (twice-born); which, in former ages, included Brahmins, Cshatriyas, and Vaisyas; but, in the present, is generally understood to be confined to Brahmins, these only performing the *Oopanayanum*, or ceremony of tying on the sacrificial cord; whence the second birth, with the texts of the Veda.

If the legality of the act in purchasing a son be admitted, the extracts shew sufficiently his rank, and the share to which he is entitled.

Translations of Extracts from various authorities relative to a son purchased; accompanying Extract of Letter from Mr. Ellis, ante, p. 123.

1.—Datta Mimamsa.

The taking of any of the twelve descriptions of sons, except the adopted son, and the son of the body; human and equine sacrifices; and intoxicating liquors, are to be avoided by twice-born (*Durgati*, Brahmins) in the Caliyuga.

2.—Brihat Gautama.

Those who become made, adopted, *purchased*, shall belong to the *gotrum*, (tribe,) but not to the *sapendya*, (kindred,) of their adoptive father.

3.—Briihan Menu.

Text.

The *sapindata* (connexion of kindred) between sons adopted, *purchased*, &c. and the sower of the seed, (the natural father,) is like that of kinsmen in the fifth or seventh degree; but the *gotrum* is that of their protector (adoptive father).

Commentary.

" The sower of the seed." There is indeed the *sapindyam* (relationship) of matter, blood, and body

of the procreator, but not the *sapindya* (relationship) of *gotra* (tribe,) in like manner as a virgin, whose *gotra* (tribe) is according to her father's genealogy, but her *santati* (affinity) is with him who has received, or protected her.

4.—Gautama Dharma.

Note.

The text and commentary are jointly translated.

The son of the body, or the son whom his mother conceived by connexion with another man by order of her husband, or a son who has been adopted, or a putative son, or a son conceived by his mother in adultery, or a son rejected by his natural parents,—all these sons are entitled to the estate of the person who has adopted them; they are likewise said to be of his *gotrum.*

A son born of an unmarried girl, or one conceived by a woman before, but born after marriage, or a son by a twice married woman, or a son born of an appointed daughter, or a son self given, or a son *purchased,*—these sons are said to be of the same *gotrum* with that of the person who has adopted them, &c. but they are not entitled to his estate.

If, of the twelve descriptions of sons, the first do not exist, the second is entitled to the estate of the adopter, and also to offer the *pindah* in his name; and so of the rest.

5.—Smriti Chandrica.

The taking of any of the eleven descriptions of sons ollowing the son of the body, was admitted in the former ages; but, in the Caliyuga, the adopted son only; as in the text beginning, "The taking of any, "except the adopted son, and the son of the body," which prohibits the taking of any of the rest in the Caliyuga. The substituting of a daughter for a son is also prohibited, being included among those rejected in the Caliyuga. Thus it is to be observed that, in the event of the failure of either the son of the body, or a grandson, a man may adopt a son, but not take one of any other description.

Note.

As the Smriti Chandrica goes expressly on the authority of the text of the Datta Mimamsa, the first in these translations, it ought to be considered, though worded generally, as applying only to the twice-born, Brahmins, to whom it is limited in the second number of that text.

Extract of Letter from Mr. Colebrooke to Sir T. S. dated Calcutta, May 18, 1812.

'I HAVE been favoured with your letter of 29th April,(1) and have great satisfaction in communicating to you all the information I possess on the questions of Hindu law, to which it relates.(2) I beg you would at all times command me, without scruple or hesitation, and consider any apology for doing so as entirely superfluous.

I now forward my answers to the questions on the case of the alleged adoption by purchase, and on that of a will by a Hindu of an undivided family, as well as upon slavery.

From the extent of research on the first question, which I observe in the papers you were so good as to send to me, I conclude you will not be averse to be troubled with a large collection of passages, on the points of Hindu law, which have engaged the attention of your Court. I shall accordingly transmit copies of numerous, and copious extracts, from legal authorities, to which I have referred in a general manner in my answers. I fear they may not be transcribed in time to accompany this letter, which I am unwilling to keep back, as you desired an early answer. They shall however be forwarded in a few days, and may perhaps reach you before the causes, depending in the Court, come on in the next term.

(1) Ante, p. 109.
(2) Ante, p. 114.

Accompanying Letter from Mr. Colebrooke, of 18th May, 1812, ante, p. 128.

Question 1.

Does purchase alone amount to adoption? or can adoption grow out of it?

Purchase alone does not, I apprehend, amount to adoption. To constitute adoption by purchase, there must be an express, and specific acceptance of the boy as son, the child being surrendered by his parents in consideration of a price paid. The following extracts from my collection of passages of law, relating to this form of adoption (copy of which I enclose), appear to me to declare that very distinctly:

"A child, sold by his father and mother, and re-
"ceived as issue, is a son bought." Sulapani. Com. on Yajnyavalcya.

"The son bought is son of him by whom he is pur-
"chased, that is, by whom he is taken with the will, "*let this be my son.*" Nandi Pandita. Com. on Vishnu. (Author likewise of the Datta Mimamsa.)

From these passages, joined with the direction in Vijnyaneswara's Mitacshara, that the same forms of publicity are to be observed in this, as in the adoption of a son given, it seems to follow, that the child should be received with the purpose publicly declared, or distinctly manifested, that the child shall *thereby* become

son to the buyer. The mere intention, that the child now purchased shall be adopted at a future time, not being followed by actual fulfilment of such intention, cannot constitute adoption; nor could a purchase, which was made with a different design, be converted into an adoption of this sort by subsequent acts.

The essence of adoption by purchase is a sale on the one part, and a formal acceptance on the other, *as of a son;* in the same manner, as the essence of the adoption of a son given, (which is the common form,) is the gift on the one side, and the formal acceptance of the child as a son on the other: and the rest of the ceremonies prescribed are the same in both forms of adoption, and may be completed in pursuance of the adopter's intention, by others for him, if he should die prematurely. The unintentional omission of some part of them by the adopter would hardly invalidate the adoption; though the wilful omission of the whole by him might have that effect: since the performance of the ceremony of tonsure, and other rights, in the family of the adopter, is indispensable to the completion of the adoption in the one form, and must, I conclude, be held to be so in the other; conformably with the doctrine of Vijnyaneswara, concerning the observance of similar forms in these various modes of adoption. I think it right, however, to observe, that, in the kindred case of the *Critrema*, or son made, the mode of adoption, as practised in those of our provinces in which it prevails, is very simple; being completed by the declaration and consent of the parties, without any religious ceremo-

nies. The Dattaca Mimamsa, on the contrary, holds the performance of these rites to be indispensable in the instance of the *Critrema*, as well as the *Dattaca*, both which forms of adoption that author considers to be now legal; and the omission of them by the adopter reduces the child to the condition of a slave. Under this exposition of the law on this point, the same must be affirmed concerning the *Crita*, or son bought, if this be considered as a mode of adoption now lawful, since this writer's authority is recognised in the South of India; the religious rites must be then admitted to be essential to an adoption by purchase.

Question 2.

Is adoption by purchase legal, according to Hindu law, as it prevails in the Peninsula of India?

I should not hesitate to pronounce it illegal, were it not for the information furnished by Mr. Ellis, that, with some castes, in that part of India, the mode of adoption is uniformly by purchase. It is true, as remarked by Mr. Ellis, that Vijnyaneswara, in the Mitacshara, does not declare this, and certain other modes, to be now unlawful; but numerous authorities, including the best commentaries on that work, concur in affirming its illegality. I enclose a collection of passages relative to this point, which clearly establish it. The author of the Datta Mimamsa, whose quotation of a passage concerning its unlawfulness in the case of a Brahmin, or twice-born man, is relied upon by Mr. Ellis, as a restriction of the prohibition to that tribe,

and who was himself a commentator on the Vijnyaneswara, has expressly treated the question, both in the Datta Mimamsa, and in his Commentary on Parasara; and explicitly declares, that any other adoption but that of a son given, or of a son made, is prohibited; no other sons but these, besides legitimate issue, being permitted in the present age: and he marks no distinction of tribe, nor restricts the rule to the Brahmin, or the twice-born. I think there must be some error in the quotation in question. But not to trouble you with a critical disquisition on the passage, I will state my reasons for thinking so in a separate memorandum, to be communicated, if you think proper, to Mr. Ellis;—for whose knowledge and acquirements I have a great respect.

In the accompanying collection of citations from authors, some will be found (but not of writers whose works are received in the South of India), which admit the adoption by purchase to be still lawful: and, if the practice do actually prevail, as a received and acknowledged custom, in any part of the territories of Fort St. George, it must rest on some such reasons as are given by the authors here alluded to.

However, from the answers of the Pundits of Chittoor, and Verdachellum, and even Trichinopoly, I should certainly conclude, that adoption by purchase was not understood to be lawful in that part of India. The first expressly say it is not; and the latter converts this into the common adoption, viz.—that of a son given, by turning the purchase money into a present. It argues,

I think, his conviction, that adoption cannot be simply by purchase, as the law now stands.

Question 3.

Admitting adoption by purchase to be legal, is B, according to the case as stated, to be taken to have been adopted by A, so as to be now entitled to succeed by right of adoption to his estate?

There is no proof of actual adoption. The bill of sale is no evidence of it; on the contrary, the tenour of that document is incompatible with the supposition that adoption took place at the same time with the purchase. The testimony of the mother, even if credit be given to what she deposes, does not go to an adoption; but to a promise of adoption to be made at a future period. From the facts, as stated, it is highly probable that the purchaser did entertain at one time an intention of adopting the boy, but afterwards changed his intention, and never did perform any of the ceremonies attendant on adoption, or consequent to it, nor ever did declare, in an express or formal manner, that he took the boy as his son. B, therefore, cannot be considered to have been adopted by A, nor be entitled to succeed by right of adoption to his estate.

Accompanying Letter from Mr. Colebrooke, May 18, 1812; *ante*, p. 128.

I APPREHEND there must be some mistake in regard to the passage quoted by Mr. Ellis from the Datta Mimamsa. In two copies of Nandi Pandita's Datta Mimamsa in my possession, one procured at Benares, the other in Bengal, the texts cited by the author are,

1st. *Vrihaspati.* "Sons of many different sorts were "adopted by ancient sages; but such cannot now be "adopted by men destitute of those eminent powers." 2nd. *Saunaca.* "The taking as a son any other but "the son given, and the real son;" "*Dattaurasetare-* "*shautu putratevina pangrahah.*" The sentence is left incomplete in both my copies, and is not followed by the words which Mr. Ellis translates "Human and "equine sacrifices, and intoxicating liquors, are to be "avoided by twice-born in the Caliyooga?" The hemistick above-cited from Saunaca is the same, which is quoted without the author's name in the Smriti Chandrica, and is part of a very long passage of Saunaca, consisting of many stanzas inserted at full length in Nandi Pandita's Commentary on Parasara; (ch. i. v. 33.) enumerating various practices authorized in former ages, and forbidden in the present; but containing no restriction of that prohibition to any particular tribe. The author had, a few lines before, cited from the Brahma purana, the same stanzas which are quoted in the note

to Sir W. Jones's translation of Menu from the Anditya purana, and which terminate with the following hemistick; the sacrifice of a man, and of a horse, and intoxicating liquors, are to be avoided by the twice-born in the Cali age? "*Narasiva medhan Madyancha Calan "Varjyan Devijatilhah.*" In commenting on the passage of Parasara, which gives occasion for these quotations, and which expresses that blame is not to be imputed to the twice-born, for practising in former ages observances which were then authorized, the commentator adds, "Nor to the *Sudra*, and other tribes;" which shews that he understood the inferior tribes to be affected by the general prohibition, against practices formerly observed, but now forbidden.

In afterwards commenting on the passages cited by him, containing such prohibitions, he considers that which relates to intoxicating liquors, as intended to forbid the use of all sorts of inebriating liquors to the three twice-born tribes, or rather to six tribes including the *Murdhavesuta*, and others born in the direct order of classes, excluding therefore from this particular rule the *Sudra*, and inferior tribes. In his subsequent comment on the passage concerning adoption, he notices no restriction of caste, but states the rule as a general one; and quotes Vrihaspati's authority, in confirmation of Saunaca's.

From these circumstances, I am led to think, that a line taken from the Parasara above mentioned, had been interpolated immediately after the passage quoted from Saunaca, in the copy of the Datta Mimamsa which

Mr. Ellis used; and that the author of the Datta Mimamsa does not consider the prohibition of adopting other sons but the *Dattaca* and *Critrema*, as confined to the Brahmin, or twice-born; but as extending equally to all the Hindu castes.

Extract of a Letter from Mr. Ellis, to Sir T. S. dated June 8, 1812.

I HAVE been favoured with your note, enclosing Mr Colebrooke's paper.

If you will have the goodness to return me the extracts I sent, (of which I have no copy,) I will refer to the original, and endeavour to verify the text to which Mr. Colebrooke objects. In usage of caste, in general customs, in religious acts, the mode of conducting the religious ceremonies, &c. &c. the *Draveda*, or South-western division of India, differs so much from the *Gauda*, or North-eastern, that, if additions or variations are, on comparison with the *Gauda* copies, found in the *Draveda* copies of books of authority, they ought by no means to be lightly received as interpolations, or mistakes; if supported by the coincidence of a number of copies, they constitute, if they occur in law-books, the law of *Draveda*, however it may differ from that of *Gauda*. The reason of this is not difficult to ascertain. The Brahmins, in introducing into this part of India, their laws and religion, were obliged in many things, to conform to the opinion of the aboriginal inhabitants, though in many instances immediately opposed to their prejudices; hence the Sudra high priests, in most of the *Siva* Pagodas on this coast, the indiscriminate female intercourse, and succession in the female line in Malabar, the primogeniture succession to landed estates among

the *Velmawon*, and other northern tribes, the exclusion of widows from succession even among the Brahmins; &c. the truth being, that the law of the *Smritis*, unless under various modifications, has never been the law of the Tamil, and Cognate nations.

Paper by Mr. Ellis, communicated August 16, 1812, *in answer to Mr. Colebrooke's paper, ante,* p. 134.

THE following observations, on the subject of Mr. Colebrooke's paper, are offered with all the deference due to his superior knowledge; and, indeed, after the opinion he has expressed, would not have been offered at all, did I not believe it will be found, that, in the *Dravida* division of India at least, not only the strict letter of the law is frequently superseded by local customs, but that the propriety of these variations are systematically defended, and the argument in support of them, ready in the mouths of all here, who consider themselves lawyers. This argument, as far as it is applicable to the present question, I shall here state.

It is admitted by all, that, at the commencement of the Cali yoog, many laws before prevalent were repealed, lest, in this sinful age, they should become the cause of criminal actions. The most prominent, among these, is that remarkable provision, in which both the ancient Jewish and the Hindu laws nearly coincide, namely, the appointment of a widow "to raise up seed" to her husband, by the instrumentality of a near relation. This all agree to be abrogated by law, and to be now illegal in practice; the purity of primeval ages having ceased, its tendency is evident; it requires no argument to discountenance it, since none could make it clearer than it is at the first glance.

But, though this be admitted, there are some prohibitions, that relate to acts from which neither breach of morality, nor even irregularity, as regards ceremonial rites, can be inferred; and these, by common consent, are not considered imperative. The cases usually cited are,—

The immolation of the victim, and the preparation of its flesh by Brahmins.

Sale of the *Soma* vine by Brahmins.

Performance of pilgrimage to distant places, by a householder.

Intermarriage with the daughter of a maternal uncle.

These are all prohibited; yet, notwithstanding, the two former are known to be generally practised, the third is thought to be meritorious: and, with respect to marriage with the daughter of the maternal uncle, so contrary is the practice to the precept, that the intermarriage with such a relation, if she exist, is considered incumbent.

Whence then shall it be said, seeing that universal practice is against it, that the prohibition contained in the text, *Dattauras itareshantu*, is more binding than any of these? It cannot be assimilated certainly to the text, *Vidhavayah prajotpataw devarasyaniyojanam*, relating to the appointment to raise up seed; for what are the immoral and pernicious consequences which may be expected to result from it? If it be not meritorious, like the performance of distant pilgrimages by domestic men, nor incumbent, like intermarriage with the daughter of a maternal uncle, it is at least indifferent, like the

immolation of victims, or the sale of the *Soma* vine by Brahmins.

Again, let us see if there exists in point of morality or policy, the same ground to prohibit the son purchased, as for the prohibition of other descriptions of sons, to whom the text appears to relate. With regard to the *Cshetraja*, (the seed raised up to a husband,) it is included in the general argument above. The admission of the *Sahodajah*, (son of a pregnant widow,) and of the *Caninah*, (son of an unmarried girl,) to equal privileges with sons of the body, and adopted sons, tends evidently to encourage want of chastity in women. That of the *Pannarbhavah*, (son of a twice-married woman) has a like tendency to alienate the affections of women from their husbands, and to encourage the abomination of second marriage. To admit the *gód,hatpana*, (son of unknown birth) leads to confusion of castes, and, by consequence, the subversion of the established order of society;—while, to legalize the *Swayandattah*, and *Crutrimah*, (son self-given, and self-sold,) is to encourage filial disobedience.—The immoral or pernicious tendency is clear in all these instances;(1) but, how is it so with regard to the *Crita*, and other descriptions of prohibited sons? Can it be said that avarice is encouraged by the purchase? The objection, applicable at all only to the natural father, is removed, by considering the price in the nature of a conciliatory present, such as is, upon several analogous occasions, enjoined by the law.

(1) See the enumeration, post, p. 189.

From this examination, it appears, that, as opposed to other questionable modes of filiation, the one in dispute is unobjectionable; so that, though there should be no authority for it beyond custom, it should be admitted, upon the principle of the old law, provident as it was against the failure of sons.

In the foregoing sketch, the argument is confined to the question respecting a son purchased; but it is applicable, *mutatis mutandis*, to a variety of other points, in which the practice of the various tribes of *Dravada* differ from the received law, as contained in the Smritis or their commentaries. It would be difficult to enumerate all the practices not merely unsupported by, but, as here assumed, in direct contradiction to, the law of the Smritis. Among the more prominent are, 1. The indiscriminate intercourse of females, consecrated by the marriage rite, with all males of equal or superior caste, and other customs prevalent in *Malayalam*, said to have been introduced by *Sancaracharya*. 2. The admission of primogeniture (though the preference of the elder son in the Caliyuga be forbidden) with respect to landed estates, to which regalities are or were attached. 3. The division of estates, in case of one person having several families by different women, among the families in equal shares, without reference to the number of persons in each.(1) 4. The exclusion of females from inheritance, according to the prescribed order of succession, &c. &c. These instances, and others relating to the conduct of religious ceremonies, and the superintend-

(1) See vol. i. p. 181.

ence of religious establishments, in which the inferior castes are allowed to assert a pre-eminence over the Brahmins, clearly prove, that though the latter were successful in extirpating the aboriginal religion of the South, (that of the *Samaner* or *Jainer*,) they succeeded but partially in introducing the laws of the Smritis, and were obliged to permit many inveterate practices to continue, which they found it impossible to abolish. That they should have endeavoured since, by construction, to bring them within the pale of the law, is but an instance, among a thousand, of their characteristic sophistry; and, under similar circumstances, is all in the customary course of human nature.

I shall, in conclusion, venture to make some remarks on Mr. Colebrooke's memorandum.

The first quotation in my former paper was not, as Mr. Colebrooke apprehends, from the (1) Datta Mimamsa of *Nanda Pandita*, but from that of *Vidyaranya Sevami*, the author of the Madhaveyum, and the principal authority in this part of India; as he may be said, with great propriety, to be the lawgiver of the last Southern Hindu Dynasty, (that of *Vidyanagara*). The text *Dattaurasa*, &c. is found in this work in the *Datta Hama Pracarana*, the chapter on religious rites to be performed at adoption; the whole of which being, with the *Vaidica*, not the *Pauranica* texts, can, according to *Dravida* notions, apply to *Brahmins*, or, at most, to them, and *Cshatriyas* only. This *Pracarana* concludes

(1) Numerous works bearing this title are found in Southern India; many of them of very recent composition.

thus: *Etadaswagotra putra grahana vishayum Dattaurasa*, &c. Thus is particularized the ceremonies required on adopting a son, not of the same *gotrum*. Then follows (without the name of the author) the text I quoted, with the final hemistick, and another respecting real and personal property; throughout the *pracarana*, the performer of the rite has been considered a *Devijati;* and, to such, the concluding sentence, above quoted, shews it to be restricted, by the use of the word *gotrum;*(1) for, with respect to those who are *Divijatis* (and, in *Dravida*, Brahmins only are so), there is no distinction of *gotrum*. By thus introducing the text, therefore, there can be no doubt but that the author, who wrote in recent times, and in Southern India, understood it to be restricted to Brahmins. So, indeed, from its collocation, it must have been intended to apply, had he even omitted the last hemistick.

On reference to a correct copy of Nanda Pandita's Datta Mimamsam, procured at Madras, I find the text quoted, as stated by Mr. Colebrooke from Bruhaspati—*anècadah crutah putra*, &c. sons of many different sorts, &c. in the section relating to the Caliyuga; but *Saunaca* is not mentioned; so that the text *Dattaurasa*, &c. which follows, appears also to belong to the former author, and the second hemistick of the verse *Naraswamedhau*, &c. occurs as part of the quotation. This shews the variation in the copies in use here, and in the North-eastern districts of India; but it in no

(1) The intention of the rite is to convert the son adopted from the gotra of his natural, to that of his adoptive father. If he be of the samegotra, the ceremony is not requisite.

manner affects the general question; as Nanda Pandita, who goes on to state the legality of a reception of the several descriptions of sons denominated *Paunarbhava*, son of a twice married woman, (here an utter abomination,) is no authority whatever in *Dravidam;* and, as no doubt can exist that this author intended the whole of his treatise to apply only to *Divijati* in its more extended signification, this he positively declares further on, in the section relative to the marriage of adopted sons, in a remark he attaches to a text quoted from Vijnyaneswara. The passage is as follows:— "*Mátur yed agré jayante divitiyam maunjya bandanàt.* "*Bráhmana, Cshatriya, Visas-tasmad été devija Smriiti.* "*Iti sudrasya cha ecam eva jannách chhudrasya datta* "*putrò nàsti.*"—*Text:* From their mother first; and, secondly, by tying on the sacrificial cord, Brahmins, Cshatryas, and Vaisyas, are said to be twice born. *Commentary:* Thus, as there is but one birth to the Sudra, there is no adopted son to the Sudra.(1)

It cannot now, I think, be maintained, that the latter hemistick of the controverted text is, as supposed by Mr. Colebrooke, in the last paragraph of his memorandum, interpolated. I have not been able to ascertain precisely the author of this text, as I cannot procure the second *Cándom* of the Bruhaspati, nor any part of the Saunaca Smriti; but, whether this hemistick be to be considered as originally a *Smarta*, or a *Pauránica* text, certain it is that it forms part of many

(1) Ante, p. 65.

verses besides that in question, where interpolation cannot be suspected; in addition to that referred to by Mr. Colebrooke, as translated by Sir William Jones, from the Smriti Chandrica, *Matru Sapindat*, &c. the following, from the *Turiyasrama Depica*, a treatise by Narainasrama Swami, on the fourth state, (as allowed in the present age,) is another example. "*Mámsena* "*paitriica vid his sanyáso gósavas tadhà. Naràswa-* "*meadhan madyancha calan vèrjam devijatibheh.*" The performance of the rites to ancestors with flesh, the sacrifice of a cow, a man, or horse, &c. Here also the author is not stated. Similar variations in works relative to law or religion, if found, in collation, to prevail in the generality of copies, in use in the Northern or Southern provinces of India, are not to be attributed hastily to interpolation; as all manuscripts are easily interpolated, so they are greatly liable to it, and ought to be suspected, if private interest can be supposed to have operated; but differences of the nature here alluded to are intentional and systematic, and should be received as correct readings, as they apply, whether to *Gauda* or *Dravidam*.

With respect to the actual law in the present age, as to a son purchased, the greater number of positive authorities may, perhaps, be in favour of the exclusion of this description of son; it may be observed, however, that neither in the Mitacshara, nor the Madhaviyam, is the prohibition noticed; and that in the *Lohitu Smriti*, considered of special authority in this age, it is not only positively allowed, but rules are laid down

for the practice of it, in the very chapter which treats of inhibitions in force in the *Caliyuga*. After enumerating various actions prohibited in the present age, some of which, such as polygamy, are in direct contradiction to universal custom, Lohitah proceeds:— "*Évam ádini ch' ànyáni Carmáni*," &c. These, primarily, and other actions, are not to be done on the earth in the Caliyuga, as they (the authors of the Smritis) have declared them not to be lawful. In this predicament stand twelve out of the fifteen descriptions of sons(1); and among these especially the *Cshetrajah*, or him begotten by another person on one's own wife. *Datta petrubhyàm Dattàchya*, &c. He who is given by his parents is called a son given, and he is of two kinds; namely, he given from desire of emolument, and he given without such desire: among these, in case a son of the body should be afterwards born, the former shall share a fourth part, but he who has been given to his adoptive father by his parents, uninfluenced by the desire of gain, shall share equally. *Vicritah cadhetas-chaivam*, &c. He is called a son sold, who is sold by his parents, or those who represent them, as by an elder brother, who directs the family affairs; by a father's younger brother; by a paternal grandfather, or his wife; and by a maternal grandfather. "*Swa-*" "*yamcritas tu cadhitah putrah Criitrimah Sanjnyicah*," &c. A son sold by himself, is said to be designated by the term *Criitrimah;* he, and the son self-given, that

(1) The author, in his work, enumerates *fifteen* descriptions of sons.

is, given by his own mere motion, as they themselves seek support, are condemned.

Accompanying is an extract from the Lohitah Smriti, being the commencement of the section entitled *Cali-yuga Nishedam*, and containing the whole passage relative to the several descriptions of sons to be received, and not to be received in the present age; it will enable Mr. Colebrooke, should he be so inclined, to ascertain whether any difference exists between the *Gauda* and *Dravida* copies of this work, as very possibly is the case. The extract was transposed into the *Nagari*, from a copy in the *Tinugu* character.

The several descriptions of sons mentioned in the Extract are:

Cshatrajah	2 kinds
Gudhajah	2 ditto
Caninah	1 ditto
Caninah, or Durjanih	1 ditto
Paunarbhava	2 ditto
Dattah	1 ditto
Critah	1 ditto
Crütrümah	1 ditto
Swayendattah	1 ditto
Sahodhajah	1 ditto
Apaviddhah, or Crütacrütah . .	1 ditto
Atmajah	1 ditto
Dauhitra	1 ditto

Sixteen, or considering the two last the same, fifteen. If from the former number twelve be rejected, according to the first paragraph of the extract, four remain as lawful sons, which are Atmajah, Dauhitrah, Dattah, and Critah.

Extract of a Letter from Mr. Colebrooke to Sir Thomas Strange, dated September, 1812.

I WAS favoured with your letter of the 11th and 20th of last month; and enclose a short memorandum, (1) in answer to Mr. Ellis's observations, which I have confined to the point of law, without farther discussion regarding the accuracy of the quotation which I questioned. I still think it wrong, though found, as Mr. Ellis has ascertained, in the copies of treatises on adoption used at Madras. But the point of law is not affected by it in my opinion.

I think it pretty clear that adoption by purchase is by law forbidden in the South of India, as in other provinces; and that no established usage to the contrary can be shewn to exist; and that, in the particular case before the Court, the child was not adopted by the purchase made of him; and that the intention which rather appears to have been at one time entertained of adopting him, was given up in consequence of displeasure conceived against him, without having been even partially carried into effect.

Your apprehensions of the possible effect of local influence on the Pundits of the Sudra Adawlut, at Madras, seem to have been but too well founded. A bias is obvious throughout their answers. They make great use, I perceive, of the authority of Jagannatha,

(1) Post, p. 151.

the compiler of the Digest, which was translated by me. We have not here the same veneration for him, when he speaks in his own name, or steps beyond the strict limits of a compiler's duty: and, as his doctrines, which are commonly taken from the Bengal school, or sometimes originate with himself, differ very frequently from the authorities which heretofore prevailed in the South of India, I am sorry that the Pundits should have been thus furnished with means of adopting, in their answers, whatever doctrine may happen to be best accommodated to the bias they may have contracted: and I should regret that Jagannatha's authority should supersede that of the much abler authors of the Mitacshara, Smriti Chandrica, and Madhaviya.

Copy of the Memorandum referred to in the above Extract; ante, p. 150.

After carefully considering Mr. Ellis's observations, I do not find reason to change my opinion, that the adoption of a son by purchase is prohibited by books, received as authority in the South of India. The silence of the Mitacshara and Madhaviya, will not avail against the explicit language of so many others, particularly the Smriti Chandrica, and numerous treatises on adoption. For the silence of the Madhaviya, it is the less to be relied upon in argument, since it appears from a remark of Mr. Ellis, that the author of that work does quote, in his treatise on adop-

tion, the very prohibition in question, restricted, however, as Mr. Ellis understands the quotation, to the *Devijati;* and I find him cited in a commentary on the Mitacshara for that quotation, *unrestricted.*

The commentators of the Mitacshara do not understand the silence of this work as an indication of dissent; but merely as an omission, which they supply in these words: "All this relates to other ages. But, in "the Cali, the true legitimate son, and the son given, "as well as appointed daughter (since she is equal to "the legitimate son), are alone admissible; for a text "of law prohibits in the Cali age, the filiation of any "but the legitimate issue, and son given; and the "practice of the virtuous, in the present age, is observed "to be conformable to that prohibition."

The passage cited from the *Lohita Smriti* by Mr. Ellis, does not convey to my comprehension the meaning which his Pundits deduce from it; but, on the contrary, disapprobation of any adoption. The author distinctly specifies, among the twelve descriptions of sons which he disallows, "the *Vicrita,*" "one sold by "his parents, or by those who represent them;" and finally admits none but two sons: viz. "a man's own "issue, and his daughter's."

Perhaps Mr. Ellis's Pundits argue, that the *Datta,* though placed in the middle of the last, is not meant to be condemned, and that a son "given by interested "parents" is, in other words, one sold. But that is inconsistent with the separate mention of the son sold, and incompatible with the enumeration of twelve

modes of filiation disallowed in the Cali age; which, in the text of the Lohita Smriti, are, 1st. the *Cshetraja*, son of an appointed wife; 2d. *Gudhaja*, of concealed birth; 3d. *Canina*, unmarried woman's issue; 4th. *Paunerbhava*, offspring of a twice married woman; 5th. *Datta*, given; [all five comprehending two sorts respectively;] 6th. *Vicrita*, sold; 7th. *Swayancrita*, self-sold; 8th. *Critrima*, made; 9th. *Swayandatta*, self-given; 10th. *Sahodhaja*, issue of a pregnant bride; 11th. Son of an appointed wife by a childless man; (or *Dwiamushyayana*;) 12th. *Apaviddha*, deserted. (1)

Possibly, the Pundits may contend, that the author, by allotting shares to both descriptions of *Datta*, (given by interested, or by disinterested parents,) recognises the legality of this mode of adoption. But they must in that case equally admit the legality of the 11th in the list, pronounced by *Lohita*, heir of two fathers. And, if both or either be admitted, the number of twelve disallowed modes of filiation will be incomplete.

The only use, I think, which could be made of the text, in support of Mr. Ellis's argument, would be in favour of the position, that, if actually made, the adoption is not null, though it violate a prohibition. I apprehend, however, that such a position is not to be admitted, on the strength either of this, or of the passage which Mr. Ellis quotes in support of it. The meaning of that passage is, that a lawful adoption

(1) Vid. post, p. 171.

actually made, is not to be set aside for some informality which may have attended it; not that an unlawful adoption shall be maintained. Some of the prohibitory texts do indeed merely state the various obsolete modes of adoption, as "matters to be shunned;" but other passages are more explicit, and declare those modes of filiation to be "parts of the ancient law, "which were abrogated by authority at the commence-"ment of the present age;" and "acts which men of "this age cannot do, as not possessing the powers of "those of earlier periods."

The only modes of adoption, besides the daughter's son, which the law, as now in force, permits, are the *Datta*, excepted from the sweeping prohibition in almost every text on this subject; and the *Critrima*, specially excepted by Parasara. It has been proposed, by some modern writers, as Mr. Ellis does, to construe *Datta* in a large sense, to comprehend analogous modes of adoption, such as purchase, self-gift, &c. But other writers of eminence have formally confuted that interpretation; and they even construe Parasara's text, so as to exclude the *Critrima*, and permit no adoption but that of *Datta*, or son given.

Mr. Ellis, however, thinks, that the prohibition, if at all in force, is restricted to the twice-born, or Brahmin; or at most the Brahmin and Rajput. I have before stated my reasons for considering the restriction in question, to be unconnected with the subject of adoption, and confined to the contiguous words, concerning the use of intoxicating liquors. I adhere to those

reasons, supported as they are by the commentator of Parasara, whom I cited, and, considering them to retain their strength, whether the line containing the restriction, (which is wanting in *Saunaca's* text, and, in compilations, stands remote from that concerning adoption,) have been approximated by some other writer, or by an interpolating copyist. I will add, as a further argument, that if the extended application of the restrictive words be admitted, instead of confining them to the immediate topic of intoxicating liquors, it will follow, that other prohibited acts are only forbidden to the twice-born, and that the inferior tribe is still authorized to perform human sacrifices, and practise other abominations noticed in the text.

But, granting that the whole string of prohibitions, contained in those lines, are restricted to the *Devijati*, or twice-born, I cannot agree that the term can be here restrained in its signification to the Brahmin, or Brahmin and Cshatriya; exclusive of the Vanie, or Banian. The author of the passage assuredly used the term in its common acceptation, which includes the three superior tribes; and a compiler, in the South of India, does not, by citing the passage in a book there compiled, vary the sense of the word, or change the meaning of the author who used it. And the prohibition, as delivered in the particular passage which is cited, cannot be confined to the superior tribes; some other passages, to which reference has been made, declare the prohibition general, and the abrogation of the ancient

law, relating to those matters, universal, as already observed.

The rest of the arguments in Mr. Ellis's observations, relate chiefly to the force of usage, as opposed to law, and to the justifiableness of the particular custom of adoption by purchase, alleged to prevail in the South of India. I have from the first said, that the custom, if it do prevail through the provinces, may hold, notwithstanding the prohibition found in the law, and acknowledged and observed in other provinces of India. But it does not appear to be established that such a custom does exist. It is not pretended to be a general one, received by all the tribes; and no proof of particular usage seems to have been brought at the trial. To acquire the force of law, usage must be, not the erroneous or dubious practice of individuals, but an established practice, recognised and acknowledged by the entire people in the whole tribe.

Extract of a Letter from Sir Thomas Strange to Lieutenant-Colonel Blackburne, Resident at the Court of the Rajah of Tanjore, dated May 9, 1812.

We have had lately two questions before us, upon which, remaining as they do under consideration, I am desirous, before we come to a decision upon them, of obtaining the sentiments of the living, in addition to what is to be collected on the subject from books. There must be at the Court of the Rajah many learned in Hindu law, whom I should be greatly obliged to you to consult for me on the occasion, procuring and transmitting me, as soon as you conveniently can, their written opinions. You may remember having formerly laid me under a similar obligation.

The first respects a claim of adoption by purchase; a mode of acquiring a son, permitted by the ancient law, as appears by Menu; but, together with a number of other exceptionable practices, said to have been abrogated about the commencement of the present (the *Cali*) age. You will see this noticed in a "general note" of Sir William Jones, at the end of his translation. In the Digest of Jagannatha Turkapunchanana, translated by Mr. Colebrooke, there are texts and passages to the same effect, prohibitory of this mode of filiation. (Vol. iii. sect. viii. "On the Son given," p. 272; and sect. xv. "On the Adoption of Sons," p. 289, 8vo. ed.) It is said that these authorities apply only to the Bengal provinces,

where it is admitted that the practice in question has become obsolete. It has been alleged, that the practice continues to the southward, in a degree amounting to usage, that would have a claim to be protected by law; though this has not yet appeared in evidence. When the case was before us last term, our attention was primarily drawn to the circumstances, as they appeared in evidence, upon which we were of opinion that no adoption had ever taken place, whatever might have been in the contemplation of the parties. In this view of the matter, we stopped short of the strictly legal question, as to the competency in this age, and in this part of India, of the sort of adoption contended for. The case is to be reconsidered next term, when, if we have reason to think that we have been wrong in our conclusion upon the fact of adoption, we must come to the law; and it is that we may be the better prepared upon both points, that you are now troubled. The point whether, under the circumstances, it is to be taken that there ever was an adoption, is indeed a mixed question of law and fact, the other a pure question of law. Enclosure No. 1, details the case, (1) as it appeared to us upon the trial; the questions that arise upon it are subjoined. Before the trial, I laid my account with the dry point of law being the only question that would be before us, not doubting that a clear case of adoption by purchase would be established. Upon the validity of such an adoption, the authorities to which I have referred, are clear, that it ceased at the beginning

(1) Vid. ante, from p. 95 to 103.

of the present age; but their application to this part of India being disputed, it becomes necessary to consider the matter a little further, and to refer to Southern Pundits. In consulting them, it follows that it will be of importance to let them understand the ground upon which the discussion rests; and it may be convenient if their attention be drawn to the distinctions and observations that have occurred, as I am about to point them out.

The highest authority upon the subject of adoption, the *Datta Mimamsa*,(1) asserts the prohibition; but, if I am rightly informed, confines it to the twice-born (*Durjati*). The passage to which I allude is as follows: "The taking of any of the twelve descriptions of sons, "except the adopted son, and the son of the body;— "human and equine sacrifices; and intoxicating liquors "are to be avoided by (*Durjati*) twice-born men, in "*Caliyuga*." It may be asked, Who are comprehended under the description of *Durjati?* I am given to understand that, in former ages, it included Brahmins, Chatryas, and Vaisyas; but that, in the present, it is confined to Brahmins, these only performing the *Oopanayanum*, or ceremony of tying the sacrificial cord, whence the second birth, with the texts of the Veda. The inference, according to this authority and construction, would be, that the practice in the *Caliyuga* is forbidden only to Brahmins.

The Smriti Chandrica is among the authorities that

(1) By Nanda Pandita. It is to this that Mr. Colebrooke always refers. There are many other Mimamsas; Mr. Ellis quotes from that of Vidyarama Swami. Vid. ante, p. 148.

prevail in this part of India; and he is express, without limitation or distinction of class, that, failing male issue, a man may receive a son that is given to him, but not take one of any other description. The extract furnished me is to this effect: "The taking of any of the eleven "descriptions of sons, following the son of the body, "was admitted in the former ages, but, in the *Caliyuga*, "the adopted son only." As in the text beginning, "*The "taking of any, except the adopted son, and the son of the "body, &c.*, which prohibits the taking of any of the rest "in the *Caliyuga*. The substituting a daughter for a "son is also prohibited, being included among those re-"jected in the *Caliyuga*. Thus it is to be observed, that "in the event of the failure of either the son of the body, "or a grandson, a man may adopt a son, but not take one "of any other description."—This seems to include all the classes. It is the opinion of some, however, that, as this *Smriti* professes to proceed upon the *Datta Mimamsa*, a limitation is implied; and that the passage, though generally worded, must be construed with reference to the twice-born only, such being the doctrine of the treatise to which he refers.

The authority that prevails, I think, more than any other, with us to the southward, is Vijnyaneswara. This work is a commentary upon Yanyavalkya, one of the eighteen *Smritis*. In the part that relates to inheritance, there is a chapter upon "Sons bought," in which one would expect to find the prohibition noticed, supposing the practice in question to have been abrogated in the part of India for which he wrote, as well as in the higher

provinces. It is remarkable, however, that he is silent as to the disallowance of this mode of acquiring a son in the present age. He is so at least in the chapter to which I have referred. See the Mitacshara, lately translated by Mr. Colebrooke, p. 312.—How is this to be accounted for? Can it be explained? It is possible that, in some other part of his work, he may have noticed it.

The *Madhaviya* is another commentator, admitted to be of great authority on the coast. The book is rare at Madras. There will be copies of it, I dare say, at Tanjore, which having been examined for the purpose, I should be glad to be favoured with the result.

Extract of a Letter from Lieutenant-Colonel Blackburne, Resident at Tanjore, dated June 2, 1812.

I HAVE the honour to transmit herewith an original letter from His Highness the Rajah of Tanjore, and the answer of the Pandits to the questions contained in your letter of the 9th of May.(1) I am uncertain whether the answers are in the form which you desire; I will not, however, detain them on that account, but shall receive with the greatest possible pleasure any further commands on the subject, which you may do me the favour to send to me. His Highness has taken it up *con amore*, and will, at all times, be highly gratified by your calling for the opinions of his Pandits.

(1) Ante, p 157.

OPINION OF THE PUNDITS OF THE COURT OF THE RAJA OF TANJORE.

Accompanying His Highness's Letter to the Resident, of May 29, 1812.

HAVING examined *Menu Smriti*, and *Smriti Chandrica*, with many other authorities, and having considered the questions referred, the Pundits of the Court of His Highness the Rajah of Tanjore are agreed in the following answer, which they hope may be satisfactory.

The case in substance is, that one *Davidutta*, a Sudra, having no male issue, purchased *Yegnedutta*, a lad of his own caste, whom he brought up, and treated like a son. *Davidutta* being dead, *Yegnedutta*, so bought, cannot be considered as such, although the *purchased son* be one of the eleven anciently recognised by the law as capable of inheriting, distinct from the son of the body;—but, among a variety of prohibitions established for the *Caliyuga*, the competency of any son, other than that of the body, and one given in adoption, (the *Aurasa*, and the *Datta*,) is repealed. It is impossible to sustain the suggestion that is to be found in a certain *Datta Mimamsa*, limiting the prohibition to *Devijahs*, or the twice-born only,

since, in various other books, (1) of acknowledged authority in Southern India, in the chapter containing the prohibitions of the *Caliyuga*, the passage in the *Auditya Pooranum*, establishing the restriction in question, is constantly repeated, without any limitation as to caste. Opposed to such a mass of authority, the assumption of a single *Datta Mimamsa* to the contrary can carry with it but little weight. Moreover, in other works,(2) there are chapters on the prohibitions, declaring that, in the *Krita*, *Traita*, and *Devapara yugas*, men were devout and pious, while, of the *Calyuga*, weakness is the characteristic; whence sons, who were recognised in former times, are no longer admissible. In the declarations of Vrahaspati, the terms " men" and " moderns," denoting mankind in general, and the characteristic impiousness of the *Calyuga*, upon which the restriction is founded, being common to all, it follows that it is applicable to all; otherwise, should the terms used be construed to refer to Brahmins only, the inference would be, that they alone are weak and irreligious, the Sudra, on the contrary, distinguished for correctness of conduct and devotion; which, whether it be so, experience tells, and may be left to every man's judgment. It is further observable, that, in other instances, the limitation to Brahmins is express; as, in the *Brama Pooranum*, where the marry-

(1) *Smriti Chandrica, Madhaveyah, Varadarajah, Vydenauda-Dutchitya, Nurnaya Sindoo, Muyooka-Smriti, Smriti Sindoo, Smriti Saura, Smriti Yarthasungraha, Serenskarakounstoobha, Kaulnirnayadeepica, Chatour-Vimsitimatasoonskara-kaunda, Hainaudree*; add numerous tracts of *Datta-Mimamsa, Veevaudasangamara*, and *Datta Munjunze*.

(2) Such as *Veevauda Bhungarnava, Smriti Sindoo*, &c.

ing of girls from the inferior tribes, the sacrificing of men and horses, and the use of spirituous liquors, is prohibited to *Durjatee*, in terms, in the *Calyuga;* thus virtually negativing the idea, where the restriction, both in terms, and in its nature, is applicable to all. Were the limitation contended for to be admitted, the Sudra would be left at liberty to indulge in practices at which the mind revolts;—such as *(Cl.setraya)* the begetting of sons on women, by others than their lawful husbands. The prohibition in question may be considered as implicitly approved also by Vijnyaneswara, according to the maxim, that whatever is not specified in one book, if there be nothing in it contradictory, or inconsistent, may be deduced to it from others. And even, where, in some books, a particular prohibition, which is general in others, is applied to a certain class, it does not follow that the application is exclusive; the construction only being that in the class named the breach will be more criminal. For instance, it being laid down in all the books, that a Brahmin is not to be put to death, you are told in one that, upon no account is the life of the *Autraya* Brahmin to be touched. Now, if a general rule is to be superseded by a particular one, the *Autraya* alone is protected: but the effect only is, that the blame, in the specified case, is aggravated. To legalize the adoption of one already purchased, would be incongruous, as well as a contravention of the general law; since what is already become a man's own, whether by purchase, or otherwise, cannot by any means be more so. Therefore, upon the whole, adoption, after purchase, being like the flower in the

sky, it is plain to us that sale and purchase can be no foundation for the boy bought being considered as heir to the purchaser.

(Signed) NAURAYANA, *Sastry*,
RAUGAVA, *Chary*,
SOOBRAMONEYA, *Sastry*,
SUAMY, *Sastry*,
SAKHARAH, *Sastry*,
KOOPAH, *Sastry*,
ANUNTAKISTNA, *Sastry*,
CHUCKVAVURTY, *Auchery*,
RATNAGAVELSVARA, *Sastry*,
BAUVOO, *Sastry*,
MAHADAVA, *Sastry*,
VENEATA, *Chary*,
TREEPATY, *Sastry*.

Extract of Letter from Mr. Ellis, returning Mr. Colebrooke's reply.

I OUGHT to have returned you the enclosed paper (1) before. I have no further remark to make on the subject to which it relates, except that Mr. Colebrooke and myself, differing but little with respect to the main question, view it in directly contrary lights. Mr. Colebrooke maintains the law as illustrated by the principal commentators in those countries where, at one period, it was in absolute operation. I have been considering it with the Jurists of this part of India, as a standard to be referred to, rather than a rule to be invariably followed. Hence it is, that the weight of authority is referred to, in support of the former argument;—particular texts, and general reasoning in that of the latter. My paper, however, is by no means intended, as is stated in the last paragraph of the one returned, to oppose the force of usage to law; but to reconcile usage and law together, or rather, to shew that they do not disagree.

(1) Ante, p. 151.

SUBSIDIARY SONS UNDER THE ANCIENT LAW.

ADOPTION is a familiar idea; but the extent to which it was carried, and the rules to which it was reduced among the Hindus, was peculiar to their law. With them, professing, as it did, to be founded on a religious solicitude for representation by means of a son, their anxiety was for a legally begotten one, if possible; but, this being considered by them as depending on destiny,(1) their law admitted the substitution of a variety of subsidiary ones, to the number, according to Menu, and most other authorities, of eleven;(2) for the more effectually securing the due performance of the last obsequies, in a manner the most efficacious for the *manes* of the deceased. The co-existence of any considerable number was probably rare; but, the law provided for the occurrence, by settling the order of succession among them, as may be seen upon reference to the several arrangements by Menu, (3) Yajnyawalcya, (4) Vishnu, and others.(5) These various subsidiaries differing, as it will appear they did, in the mode of their filiation, were estimated differently;—all being postponed in their claims, as

(1) Sri Bhágavata, 3 Dig. 222.
(2) 3 Dig. 145, et seq. and ante, vol. i. p. 62.
(3) Menu, ch. IX. 159, 160.
(4) Mit. on Inh. I. XI. 1.
(5) 3 Dig. 150, et seq. 155. 286.—and Datt. Chandr. sect. v.

comparatively deficient in spiritual efficacy, to the son legally begotten; and, as among one another, possessing relative degrees of respectability; but all capable, in their turn and order, of inheriting, as connected with their eventual destination, to administer, by their pious offices, toward the final beatitude of their adoptive parent. This distinction in particular prevailed among them; that, while some, like the son begotten, were heirs general, inheriting universally, others succeeded on his death, in default of male issue, to the estate of their adoptive father, but not to that of collateral relations; and, as incident to it, their shares differed, in the event of a son begotten surviving, and inheriting.(1) But, though this would appear to be the general result of what is stated on the subject, opinions were not wanting, that, where several of such sons co-existed, either the rule of succession was to be drawn from the different degrees of virtue attributable to each, without attending to the particular species of adoption; or that all, so far as rank could be assimilated, should take and divide the heritage alike.(2) Into these details (of which the books in treating on this part of the law are full), it were loss of time to enter; so extravagant, and, in some instances,

(1) Menu, ch. IX. 161.
Yama, 3 Dig. 155.
Calica Purana, Id.
Datt. Mim. I. 33, 34.
Datt. Chandr. v. 26, et seq.
(2) Menu. ch. IX. 184.
3 Dig. 286, 287.
Note to Mit. on Inh. ch. I. xi. 34.

so exceptionable a method of building up a family, and continuing a name, having long since subsided pretty much into the mode of substitution already discussed, namely, the *Dattaca*, or adoption by means of a son *given*.(1) But, as a matter of curiosity, intimately appertaining to the subject, the following list of the whole is added, according to the arrangement of Menu; with his descriptions, a little amplified. And, that this should be done, is the more expedient, as analogies are still founded on this variety, and illustrations often drawn from the law respecting it, however obsolete; which could not otherwise be so well understood. Upon which it may be premised in general, that the instances enumerated have been distinguished into, 1st. Issue begotten by a man himself; 2dly. Issue procreated for him by another; 3dly. Sons received for adoption; 4thly. Sons voluntarily given;—and that

On the birth subsequent, of a son legitimately begotten, a subsidiary one, previously constituted by whatever means, has no right of primogeniture; also that such, among the subsidiary ones, as were of equal class with the father, during the prevalence of the system, were entitled to a third of the inheritance, as their allotment; while those, by mothers of a lower tribe, lived dependant on the family for food and raiment.

(1) Iim. Vah. ch. X. 7, note.

List.

1. { Aurasa; or the legitimate son — Infra.
   { Putrica-putra; son of an appointed daughter — post, p. 173
2. Cshetraja; son of the wife 175
3. Dattaca; son given 177
4. Critrima; son made 177
5. Gud'haja; son of concealed birth 179
6. Apavidd'ha; son rejected 180
7. Canina; son of an unmarried girl 180
8. Sahod'ha'; son of a pregnant bride . . . 181
9. Crita; son bought 182
10. Pawner-bhava; son by a twice-married woman 182
11. Swayan-datta; son self-given 183
12. Saudra; son by a Sudra woman 184

Of the *Dattaca*, (No. 3.) the appointment, condition, and rights, have already been considered, in the chapter on adoption.(1) And, respecting the *Crita*, (No. 9.) an ample discussion occupies many of the preceding pages of this Appendix.(2) It remains to subjoin here a short explanation of the rest, adding a few general remarks on the whole, particularly as regarding the right of inheritance. T. A. S.

I.

AURASA, from Uras, the breast; the legitimate son, begotten by the husband in lawful wedlock, called, the

(1) Vol. i. ch. III. p. 61.
(2) Ante, from p. 107 to p. 167.

son of the body.(1) It is to be noticed, that lawful wedlock, for a man of a regenerated tribe, had formerly a considerable latitude. A regenerate man is one belonging to any of the three superior classes, the Brahmana, Cshatriya, or Vaisya; for whom a lawful wife was a woman of a regenerate tribe, not necessarily, as now, one of the same class. A woman of the same class was always preferable, but not indispensable; and, in default of a preferable one, even a Sudra might have been the wife of a regenerate husband; and their issue would have been legitimate. These marriages of a Brahmin with a woman of any of the four classes, of a Cshatriya, with a Vaisya, or of a Vaisya with a Sudra, (i. e. always in the *direct* order of the classes,) were productive of a variety of mixed ones, distinguished by appropriate names; carrying legitimacy in ancient times to a great extent; it being in the *inverse* order only that marriage was forbidden; the prohibition rendering illegitimate sons by women of a tribe superior to their husband.(2) But the *Aurasa*, the legitimate son, is restricted *now* to the issue of a marriage between parties of the *same* class. On viewing his countenance, the debt of salvation, due by the father to his own progenitors, is said to be transferred to such a son; whose birth removes an obstacle that existed to the future happiness of the father himself, exempting him, after death, from eventual transmigration. It is even said, that heaven is not for one, not having a son; nor can a heavier curse be pronounced upon a

(1) Menu, ch. IX. 159. 166.

(2) Notes to Mit. on Inh. chap. I. xi. 2. and to Id. § 39. Datt. Mim. and note on II. 85.

Hindu, than that he may be childless. (1) It is added that heaven is already attained in his lifetime, by one who has sons, not having neglected the Vedas, and sacrifices. By a son, according to this creed, the father conquers, i. e. attains the world of *Indra*, and others; by a grandson, his enjoyment of them is continued; and by a great-grandson, (to use the exalted language of their chief legislator,) he reaches the Solar abode. (2)

The next in the enumeration of Menu, is the *Cshetraja*, who will be presently noticed; but it may be convenient to interpose here an account of the *Putrica-putra*, or son of an appointed daughter; who, in some lists, (as in those of Vajnyawalcya and Devala,) (3) stands second; in others, lower down; having no separate place in Menu's, for this reason; that, according to him, and the authorities following him, he was identified with the *Aurasa*, or legitimate son: there being, between such a son, and a man's own, "no difference in law;" so that both co-existing, the division of the heritage was to be equal. (4) He (the *Putrica-putra*) was of two kinds, the appointed daughter's son, and, by a laxity in language, (5) the daughter herself appointed to be as a son; in which latter case, she performed the obsequies of her father; the difference consisting in the forms of appointment, according to which the appointed daughter, or her son,

(1) Vasishta, 3 Dig. 296.
(2) Menu, ch. IX. 137.
3 Dig. 295.
(3) Mit. on Inh. ch. I. xi. 1.—3 Dig. 153.
(4) Menu, ch. IX. 131 to 134.
(5) 3 Dig. 168.

became substituted as an adopted.(1) According to some, he was of four descriptions; viz. the two that have been mentioned, and the third and fourth varying, according to the form of the stipulation, with which the daughter was given in marriage.(2) And, upon general principles, if the father, and maternal grandfather of such a child, happened to be each otherwise destitute of male issue, he was competent to perform the obsequies of both;—or it might have been so settled. To such a daughter, rank was assigned as the possible mother of a son, adopted by her father.(3) According to Vasishta,(4) the father, addressing himself to the bridegroom, (his future son-in-law,) the common form of appointment was as follows:—"This damsel, who has no brother, I give unto thee, "decked with ornaments: the son who may be born of her, "shall be my son."—Or, there might be a similar appropriation subsequent; whence, in the choice of a wife, a prejudice existed against a young woman who had no brother, her first son being thus liable to be pre-engaged.(5) In this manner, as stands recorded, did Dacsha himself, destitute of male issue, in very early times, appoint all his fifty daughters to raise up sons to him for the multiplying of his race; giving ten to Dherma, thirteen to Casyapa, and twenty-seven to Soma, king of Brahmins, with

(1) 3 Dig. 193.
(2) Mit. on Inh. note to ch. I. xi. 3.
3 Dig. 193.
(3) 3 Dig. 168.
(4) Mit. on Inh. ch. I. xi. 3.
3 Dig. 171.
(5) Sancha and Lichita, 3 Dig. 163. 192.

suitable presents.(1) It remains to add, as resting upon the authority of the most respectable opinions, that, not regarding the *Putrica-putra* as a subsidiary son, his affiliation (it would not be unreasonable to infer) would be valid in the present age.(2) To return then, to the enumeration and order, as exhibited by Menu; with whom the second is,

II.

The CSHETRAJA, or son begotten on a wife, or widow, whether by a near kinsman of the husband, or by a man of a superior class; in either case with his assent, he being, from whatever cause, destitute of male issue.(3) As in adoption, so here, the husband's brother, where there was one, was the proper person to be so employed. The want of the husband's authority might be supplied after his death by that of the wife's spiritual parents.(4) Wholly unauthorized, or not begotten according to the law, the issue could not succeed.(5) The practice, not peculiar to Hindus,(6) is compared to the seed of one sown in the soil of another, and so belonging to the owner of the soil;(7) and

(1) Menu, ch. IX. 128, 129.
3 Dig. 184.
(2) Vid. note to Mr. Sutherland's Synopsis, p. 221.
(3) Menu, ch. IX. 167. 146. 190.
3 Dig. 198.
Mit on Inh. ch. I. xi. 5.
(4) 3 Dig. 197, 198. 200.
Mit. on Inh. ch. I. x. 2. and note.
(5) Menu, ch. IX. 143, 144.—3 Dig. 201.
(6) Deut. XXXV. 5.
Gen. XXXVIII. 8.
(7) Menu, ch. IX. 33. et. seq.
3 Dig. 212. 215.

certain directions were to be observed, in order to render the act an act of duty, in contradistinction to, if not exclusive of, desire;(1) as well as to limit its repetition to the accomplishment of the object, namely, the production, under the particular circumstances, of a son capable of the filial duties; till when the act might be repeated.(2) The non-existence of male issue by the husband at the time, seems to have been essential to the claim of the son so begotten; and, if a son begotten by the husband was born afterwards, and survived, the several sons succeeded to their respective fathers.(3) Where the husband was dead at the time, the issue became *Dwyamushyayana*, or son to both,(4) as he did also, where either his natural father had no other male issue, or, in the event of its having been so agreed, *when the commission was given.*(5) So, if the issue proved to be a female instead of a male, she was the property of either, according as might have been settled.(6) A son is recorded in the *Mahabarata* to have been thus prevented "by the holy *Vasishta*, for

(1) Menu, ch. IX. 58. 60. 63. 147.
3 Dig. 195. et seq. 199, 200. 289.
Menu, ch. III. 173.
2 Dig. 474.

(2) Menu, ch. IX. 60, 61, 62. 70.
3 Dig. 196.
2 Id. 470. 485.
Gautama, id. 232.

(3) Menu, ch. IX. 162. 191.
3 Dig. 209, 334.

(4) Harita, 3 Dig. 204.

(5) Menu, ch. IX. 53.
3 Dig. 208.
Mit. on Inh. ch. I. sect. x. 2, et seq.

(6) 3 Dig. 209.

" *Saudasa*, a king of the solar race;"(1) an illustrious instance, of course. Nevertheless, the practice, originating with " the wicked *Vena*," and reprobated as vicious, is said to have ceased with his reign, being regarded as a violation of the primeval law, restricting the sex to one man;(2) and, according to Menu, it would seem to have been permitted, from the beginning, only to the *servile* class.(3) It continues to prevail in Orissa.(4)

III.

DATTACA, or the son *given*.(5) In an extended sense, the term comprehended sons any how adopted, more especially the following,(6) viz.

IV.

CRITRIMA, the son *made*;(7) being an orphan, of the same class, or one who, having been abandoned by his parents, is induced to become the son of the adopter; his consent to the adoption being the only

(1) 3 Dig. 209.
(2) Menu, ch. IX. 64—68.
Mit. on Inh. I. x. 8.
2 Dig. 474.
Datt. Mim. i. 64, et seq.
(3) Menu, ch. IX. 59. 64.
3 Dig. 196.
(4) Note to 3 Dig. 276. Id. 289.
Beng. Rep. in 1816. p. 511. " Remark."
(5) Menu, ch. IX. 169, 168.
See vol. 1. ch. III. p. 63.
(6) Sutherland's Synops. p. 212. and note xix. p 227.
(7) Datt. Mim. i. 65.

indispensable requisite to its efficiency.(1) In point of ceremonial, it is the same with that of the *Dattaca*, omitting the sacrifice, or burnt-offering, which is not performed at it.(2) Succeeding partially to the adoptive right, his connexion with his natural family, by which he has never in fact been more than tacitly relinquished, remains to the *son made* in full force; and this, among other things, distinguishes him from the son *given*.(3) Initiation into the family of the adopter is not practised, where alone this mode of adoption is at this day, generally speaking, in use, namely, in the *Mait'hila* country,(4) whatever might be its effect, if performed, in assimilating it more to that of the son given, especially in the event of its not having previously taken place, in the natural family of the adopted.(5) In *Mait'hila*, also, the widow is, as of right, at liberty to adopt, without special authority for the purpose; the adopted, in this case, succeeding to her exclusive property only, not to that of her deceased husband, to whom he is not considered as in any way related.(6) Whether, *out* of *Mait'hila*, or wherever else this mode of adoption customarily pre-

(1) Menu, ch. IX. 159. 169. 3 Dig. 277.
Mit. on Inh. I. xi. 17. note.
Sutherland's Synops. note viii. p. 224.
3 Dig. 278.
(2) Mit. on Inh. I. xi. 15, and note.
(3) Note to 3 Dig. 276.—Id. 282.
Notes xviii. and xix. to Mr. Sutherland's Synops. p.
(4) Note to 3 Dig. 276.
Note xv. to Mr. Sutherland's Synops. p. 227.
(5) Notes xvii. and xix. to Mr. Sutherland's Synops. p. 227.
(6) Note v. to Mr. Sutherland's Synops. p. 222.

vails, it would be sustained as legally valid, must be left for future inquiry. An opinion, to which great weight is due, is in its favour; founded upon authorities, identifying the *Dattaca* and the *Critrima*, and even using the former denomination as denoting both.(1) In the only reported cases on the subject,(2) the adoption was from the district of *Tirhoot*, in *Mait'hila*, which of course leaves the question open.

V.

GUDHOTPANNA, or Gud'haja;(3) a son of concealed birth, secretly begotten on a married woman, by a man of the same class with her husband, *but without his privity;* which distinguishes him from the *Cshetraja;* the husband being supposed by Menu to have been absent at the time.(4) Failing prior claimants, the son in question was entitled to be considered as belonging to his mother's husband; a pretension, founded on the doctrine of the right to the soil prevailing over that of the seed;(5) *partus sequens ventrem.* If the begotten was alike unknown to the wife as to the husband, as where she was "secretly violated by a stranger, in a dark night," the importance of the offspring was pro-

(1) Mr. Sutherland's Synops. p. 211, 212, and note x. p. 224.
(2) Kullean Sing v. Kirpa Sing, Beng. Rep. ante 1805. p. 9.
M. Sutputtee v. Indranund Jha, Beng. Rep in 1816, p. 509.
(3) Menu, ch. IX. 159.
(4) Menu, ch. IX. 170.
3 Dig. 210.
(5) Menu, ch. IX. 32, et seq
3 Dig. 215.

portionably diminished, and it was even liable, according to some, to be abandoned.(1)

VI.

APAVIDDHA; the son rejected by his natural parents,(2) whether from inability to maintain him, or otherwise;(3) and, so picked up, as it were, by some stranger, not for the sake of supporting him, but from being in want of a son; in which case he became an adopted one, ranking and succeeding as such, in his turn.(4) As described, he does not appear to have differed materially from the *Critrima*, or son made; and it is accordingly said, that gift is the foundation of right to the son given; and neglect to the son made, or rejected,( ) thus coupling the latter together.

VII.

CANINA, or CANYASUTA; the son of a young unmarried woman,(6) or one whom a man's daughter privately brought forth in the house of her father.(7) He became son to his maternal grandfather, or to whoever subsequently married his mother; or to both, as the

(1) Mit. on Inh. I. xi. 6. and note.
(2) Menu, ch. IX. 159. 171.
3 Dig. 281.
(3) Mit. on Inh. I xi. 20. and note.
(4) 3 Dig. 281.
(5) 3 Dig. 282.
(6) Menu, ch. 160 172.
3 Dig. 225.
(7) Note to 3 Dig. 230.

one, or the other, or both, happened to be otherwise deficient in male issue.(1) The maternal grandfather's claim to him was (to recur to a familiar illustration) *in right of the field.*(2)

VIII.

SAHODHA; or the son of a pregnant bride.(3) Received together with her in marriage, he was, in law, by whomsoever begotten, the son of the bridegroom; not in right of birth, since he was not procreated by him; nor on the ground of the "receptacle belonging to him at the time of procreation," which was not the fact; but on that of *acceptance;* having been transferred to him as a part of the mother, (in common with her clothes and ornaments,) by the maternal grandfather's gift.(4) This son was distinguishable therefore from the last preceding one, (*Canina,*) by the circumstance of his having been born in wedlock, though by a form of marriage directed for women not being at the time virgins, and in use among Sudras of the lowest rank.(5) The requisites of this filiation did not include oblation to fire.(6)

(1) 3 Dig. 226. 229. 234.
(2) 3 Dig. 226.
Mit. on Inh. I. xi. 7. and note.
(3) Menu, ch. IX. 160. 173.
3 Dig. 279.
(4) 3 Dig. 280.
(5) Mit. on Inh. I. xi. 19. and note.
3 Dig. 280.
(6) 3 Dig. 280.

IX.

CRITA, or the son bought; whom a man, for the sake of having a son to perform his obsequies, *purchased* from his parents, or either of them, being of the same class, and neither an only, nor an eldest one.(1)

X.

PAWNER-BHAVA, or a son by a twice-married woman.(2) 1. A woman was *not improperly* called so, where she engaged with another husband, her marriage with a former not having been consummated. This, it is to be remarked, is what no Hindu woman of caste can now regularly do.(3) 2. She was *properly* called so, if she took another, having lost her first. This also is what no widow, not even a *virgin* one, can now legally do, though the practice exists in some of the lowest castes. But, if her first husband forsook her, or if, for whatever cause, she chose to desert him, it seems to have been competent to her, in the times to which this branch of law refers, to have contracted with another, at least to the effect of producing issue, inheritable to her original husband. So begotten, it differed from the *Cshetraja*, (No. II.) in that there wanted the authority of the first husband to justify the proceeding. The intervention also of marriage, dis-

(1) Menu, ch. IX. 160. 174.
3 Dig. 273.
Mit on Inh. ch. I. xi. 16.
Vol. i. of this work, p. 90.

(2) Menu, ch. IX. 160. 175. 176.
3 Dig. 235.

(3) See chap. on Widowhood, vol. i. p.

tinguished this from the case of the (*Swarini*, or) simple adulteress. 3. To a third variety, where the woman had been deflowered before marriage, the denomination seems to have been but inaccurately applied. (1) The issue in any of these cases was regarded as illegitimate, and consequently not respected; though allowed to be inheritable, on failure of legitimate, or other preferable issue. And so it may be at this day, when warranted by local usage. (2)

XI.

SWAYAN-DATTA, (3) or a son self-given; resembling in circumstances the *Critrima*, or son *made;* (No. IV.) only that, in the instance of the latter, the adoption was the act of the adopter, whereas in that of the *Swayan-datta*, the adopted gave himself. Neither the one, nor the other was, like the *Dattaca*, (No. III.) or the *Crita*, (No. IX.) given by his parents; but, on the contrary, abandonment by them characterised both the *Critrima*, and the *Swayan-datta*, between whom the only difference was, that the one was picked up, for the purpose of becoming a son; the other, tendering himself as one, was accepted. As an instance of the *Swayan-datta*, it is said to be recorded in the *Puranas*, and other works, that a king, having purchased of his father a boy named

(1) Mit. on Inh. 1. xi. 8. and note.
See seven varieties compendiously stated in note to Datt. Mim. sect. IV. 58. 3 Dig. 235.

(2) Menu, ch. IX. 143. 3 Dig. 201.
Vrihaspati, 3 Dig. 241.
Mohun Sing v. Chuman Rai, Beng. Rep. ante 1805. p. 30.

(3) Menu, ch. IX. 160. 177.
3 Dig. 278.

Sunasepha, doomed him a sacrifice to the divinity; from which having been rescued by preternatural interposition, he became son of the sage *Visvamitra;* upon which it is asked, in what form did *Sunasepha* become the son of *Visvamitra*, since he had not been given to him by the boy's father? It is answered, He must be taken to have been *self-given*, having been abandoned by his parents.(1)

XII.

SAUDRA, or a son by a *Sudra* woman.(2) Out of ten lists, exhibited in the Digest, the authors of three only, beside Menu, include the *Saudra*, as one of the twelve legal sons. These are Vishnu, Sancha and Lichita, with the Calica-Purana; Vishnu, and the Calica-Purana, together with Menu, omitting the *Putrica-putra*, as being identified with the son born in wedlock; which Sancha and Lichita admit: the latter omitting the *Critrima*, or son *made*, as included (it may be) in the *Dattaca*, or son *given*. Vishnu,(3) as well as Menu, makes the *Saudra* the twelfth, calling him "a son any how produced irregularly:" a vague description, expounded, however, as meaning "a son of a Sudra woman, married or unmarried," by any other than a Sudra father.(4) Such a marriage in the present day would not be competent;(5) and was blameable

(1) 3 Dig. 288.
(2) Menu, ch. IX. 160. 178, 179. 3 Dig. 144. 283.
(3) 3 Dig. 150.
(4) 3 Dig. 283.
(5) 3 Dig. 141.

always, though permitted, being an incongruous connexion, indicating weakness of intellect, and tending to degrade the race;(1) insomuch that the connexion, without marriage, was looked upon, as in fact it is with us, as the more excusable of the two; and it was accordingly to be expiated by a slight penance.(2) The son in question is, according to Menu, one begotten on a Sudra by a man of the *priestly* class; (3) which, in this text, is said to signify a *Brahmana*, *Cshatrya*, or *Vaisya*.(4) Nothing can be more contemptuous than Menu's description of him. Said to be begotten "through lust," all idea of marriage would seem to be excluded;(5) so that, however competent to confer *some* benefit on his putative father, he was "even regarded "as a corpse, though alive, and thence called in law a "living corpse,"(6) any benefit he could confer being inconsiderable. Upon this point, however, a difference of opinion existed between two great authorities, Jimuta Vahana, and Culluca Bhatta.(7)

If the *Putrica-putra*,(8) the son of the appointed daughter, be reckoned distinct from the *Aurasa*, the

(1) Menu, ch. III. 15. 19. 3 Dig. 117.
(2) 3 Dig. 119.
(3) Menu, ch. IX. 178.
(4) 3 Dig. 284.
(5) 3 Dig. 283.
(6) Menu, ch. IX. 178.
(7) 3 Dig. 144.
(8) Ante, p. 173.

legally begotten son, (as in many lists he is, though not in Menu's,)(1) and the son by a Sudra woman(2) be also admitted as one, the number of sons, (including the *Aurasa*,) as it existed under the ancient law, amounted to thirteen;—extended by some to fifteen, but this was by splitting and subdividing. Of these, the begotten son, and the son of his appointed daughter, are often included together, under the idea of *legitimate issue;* being (as already intimated) considered in point of law as one; upon which depends, whether the whole number be to be estimated at thirteen, or only at twelve.(3) Co-existing, as happened in the event of a son being born subsequent to the appointment of a daughter, they constituted one heir, their rights of inheritance being equal; in which respect, the *Putrica-putra* was distinguishable from every other; the rest being capable of *participating*, but not equally, with the son begotten; their claim to the inheritance, as contradistinguished from *allotment*, depending in general on failure of natural issue, and proceeding in a prescribed order. What this order was, it is of little practical importance at the present day to investigate, the system of subsidiary sons, with the exceptions that have appeared, no longer subsisting.(4) It can scarcely be taken to have been simply as they stand in the lists, which differ in

(1) Menu, ch. IX. 159, 160.
(2) Ante, p. 184.
(3) Menu, ch. IX. 133. 139.
Mit. on Inh. note to ch. I. xi. 34.
(4) Mr. Sutherland's Synops. p. 211.

this respect, more than in that of number, hardly any two being arranged alike; whence arose a difficulty, that appears to have been early resolved, by resorting to *degrees of virtue*, as affording a distinguishing and corrective principle. In this way were the "discrepancies in the texts of various sages" to be reconciled.(1) How uncertain and arbitrary a criterion this must have been, is sufficiently obvious; though, in its tendency, not more injurious than the discretion with which, under the English law, every parent is invested, of determining the fortune of his children, so far as his own property is concerned, according to his sole will and caprice, excepting where they may have been provided for by settlement, or protected by entail—family arrangements, that apply comparatively to few. This reference to "degrees of virtue," without attending to the form in which a son was adopted, is said to be what was intended by Menu; (2) whose enumeration, viewed as exhibiting an order of succession, was regarded as loose;(3) an observation (it may be remarked) equally applicable to every other. With respect even to the *Dattaca*, or son given, it is remarkable, that he is not, in all the lists, among the favoured substitutes entitled to inherit generally; though the weight of authority is with Menu, who classes him among the six, entitled to rank, in point of inheritance, with the son legally

(1) 3 Dig. 155. Datt. Mim. sect. v. 20, et seq.
(2) Menu, ch IX. 184.
3 Dig. 286.
(3) Subodhini, cited in note to Mit. on Inh. I xi. 31.

begotten.(1) But, not to leave it to be imagined, that these enumerations were entirely at random, to be eventually varied and regulated upon the principle that has been alluded to, the order laid down in them is said to have been, "upon the supposition of proportionate good "qualities:"(2) so that, when these happened not to exist, the place and turn of any one might be changed; preferring or postponing him according to his relative merits. Subject to some reserve of this nature, the law may be taken to have been peremptory, that, "on failure "of these first mentioned, the next in order should "give the funeral cake, and claim the heritage; (3) their "comparative excellence depending, in general, upon the "character of their filiation."(4) Whatever may have been the force of the principle, of superior or inferior virtue, as among the subsidiaries, no excess (it would seem) in any of them could operate to countervail the claim of the son legally begotten; which, in this respect, appears to have been indefeasible; while, on the other hand, where the virtue among them was equal, they were to share alike.(5) These distinctions and differences (it is obvious) could only arise, where a plurality of subsidiary sons came in competition, and partition took place in the lifetime of the father; the law contemplating the possibility of their co-existence, to the extent of the whole number of twelve.(6)

(1) Menu, ch. IX. 159.
(2) 3 Dig. 286.
(3) Yajnyawalcya, 3 Dig 153. 386, et seq.
(4) 3 Dig. 156.
(5) Menu, ch. IX. 184 3 Dig. 286.
(6) 3 Dig. 173. 287.

Of the sons above enumerated, those referred to below (1) were particularly exceptionable; some, from the discreditable circumstances under which they were conceived; others, from the odious nature of their adoption; the son by a *Sudra* woman being, beyond every other, disesteemed; and, accordingly, though legitimate, on failure of every other claimant, allowed no more than a tenth of the paternal property, not including land.(2) With regard to the others, they succeeded, each in his turn, according to his pretensions, in default of legitimate issue. But such issue, or, (as was held by some authorities,) any one of the unexceptionable subsidiaries existing, an exceptionable one did not participate, being entitled to maintenance only; as was the lot of any one, in case of disobedience to the regular heir, or of a general deficiency in good qualities;(3) to which is to be added, that the son of the twice-married woman, the son self-given, and the son born of a female slave, (construing the latter to have meant the son by a *Sudra* woman,) were precluded from succeeding, or being appointed, to empire.(4)

(1) The son of concealed birth ... ante, p. 179.
Son of an unmarried girl ..... — p. 180.
Son of a pregnant bride ..... — p. 181.
Son bought ..... — p. 182.
Son by a twice-married woman — p. 182.
Son self-given ..... — p. 183.
Son by a Sudra woman ..... — p. 184.

(2) Mit. on Inh. I. xi. 41, 42.
Id. viii. 9, 10.

(3) Mit. on Inh. I. xi. 27, 28.
Datt. Chandr. sect. v. 12, 13.
Calica Purana, 2.
3 Dig. 155.

(4) Calica Purana, 3.
3 Dig. 155.
Datt. Chandr. v. 26, 27, 28.

What is principally material at the present day, is, to know, of these various modes of substitution for legitimate issue, which among them continues to be legal; a point not always agreed, and therefore much investigated some years back by the highest living authority, (not native,) at the instance of him, by whom these strictures have been attempted; and the result, in his opinion, was,(1) that "the only modes of adoption, *(beside the daughter's son,)* (2) which the law, as now in "force, permits, are the *datta*,(3) excepted from the "sweeping prohibition in almost every text on this "subject, and the *critrima*,(4) specially excepted by "*Parasara*;(5) that it had been proposed by some "modern writers(6) to construe *datta* in a large sense, "to comprehend analogous modes of adoption, such as "by purchase, self-gift, &c.; but that other writers of "eminence had formally confuted that interpretation; "and that they even construed Parásara's text, so as to "exclude the *critrima*, and permit no adoption but that "of *datta*, or son given."

In the seventh section of the Dattaca Mimamsa, translated by Mr. Sutherland, instances are given of the affiliation of *daughters*, corresponding with those anciently in use in the adoption of sons; but, taken as they are, from the Puranas, they are of no authority; and the opinion of Jagannatha remains uncontradicted,

(1) Ante, p. 128, et seq.
(2) Ante, p. 173.
(3) Ante, p. 177.
(4) Ante, p. 177.
(5) Datt. Mim. sect. i. 65.
(6) Ante, p. 154.

that "adoptive *sons*, being noticed by the law, are "alone legal issue; and that such *daughters*, being "unnoticed in codes of law, are not so."(1)

(1) 3 Dig. 492.

RITUAL OF THE DATTA-HOMAM.

From the Datta-Mimamsa of Savara Swami. Communicated by the late Mr. Ellis.

The giver, petitioning the king, and having declared to his brothers and relations his intention of giving his son, named Vishnu, to become the son of Govinda, afterwards, on a prosperous day, to be fixed by an intelligent astronomer, shall bathe with the child, and celebrate the rite of *Punnyaham.* On arrival of the time, attended with trumpets and other musical instruments, he shall proceed to the appointed place, purified by cow-dung, hung with colours, and decorated with flags. There, drawing in his breath, and saying to himself, "I make the gift of a son:" he is to seat the Brahmin, to whom his son is to be given, facing the north, placing himself facing the east, and present him, in token of respect, with a cow, sandal, flowers, unbruised rice, and the like; having seated his son also, properly adorned, on his thigh, and repeated from the Veda the appropriate texts, he is to add this declaration: "I "(of such a gotram and name,) desiring the semblance "of Brahma, give this son of mine to perform the duty "of a son to you, (of such gotram and name), for the "sake of the glorious and mighty Vishnu.—He is no "longer mine." Thus saying, and having previously given Turmaric water, he is to seat his son on the thigh of the adopting Brahmin, who is to accept him with

prayer and holy texts, receiving with him from the giver, a present in gold, of the weight of a *nischam*, accompanied also with prayer. The giver is afterwards to perform the remaining ceremonies, pertaining to an oblation to fire. The adopting Brahmin, then taking the child, repairs to his own house, attended with music; when, seated on the same seat with his wife and his adopted, he declares his acceptance of the child, performing, at the same time, the rite of *Datta Homam*, in confirmation of him as his son. This done, he prepares the hearth, places the fire upon it, and arranges the six vessels, namely, the ladle, the vessel for the clarified butter, and the rest. Upon which, having performed the ceremony of sprinkling, and poured the clarified butter on the fire, performing also other purifications, and taking the butter with the ladle, he repeats certain *mantrams*. After this, he pours the butter into the fire, and placing upon it the *Samit* and *Idmam*, with its string, he performs *Jayadi*. Removing then the image of Brahma, he places the child on his thigh, pronouncing other prayers, and feeding him with *panchamrutam;* (rice and milk, sweetened with honey, &c.) Finally, he gives food to a number of Brahmins, in honour of his ancestors. The above rite regards the adoption of a son from a different gotram.

Upon the above statement, it is remarked by Mr. Ellis, that the Brahmin only being mentioned, it follows that this ceremony is necessary only with respect to this caste; and that, if it be objected that the terms

include the three twice-born classes, it must be restricted at least to those tribes who now actually use the texts of the Vedam. That in Southern India, however, most, if not all the tribes, who have any pretensions to belong to the twice-born classes, Brahmins excepted, use, not the Vedam, but the *Puranic* texts only,—to whom, therefore, this ceremony is not applicable.

It is further observed by him, that the author declares this ceremony to regard only the adoption of a son from a different gotram;—that, though not improper, it is consequently not necessary when the adopted child is taken, as in the great majority of instances it is, from the adoptive father's gotram. And he concludes the result, with respect to practical use, to be, that, if the performance of the Datta Homam be established, the adoption is established; but, if otherwise, that the converse does not hold good, and that further evidence may be adduced:—adding that, in no case can the omission of the ceremony affect an adoption in other respects valid; but that, if not performed, when the adoption is from another gotram, it would seem, from analogy, that the son, so adopted, must be *Anitya-Datta*.(1)

(1) Ante, p. 96.

APPENDIX TO CHAP. IV.

ZILLA OF DARAPOORAM.

February 3, 1807.

Coopatravádoo, *v.* Sunjalatravadoo.

The Plaintiff is the legitimate son of one Condatatravadoo. The Defendant is his son by a woman whom he kept. The father being dead, what becomes of his property?

Answer.

It is his son's, by his lawful wife, to the exclusion of the Defendant, subject to any gift that may have been made by the deceased in his lifetime; and this not in fraud of the rights of the Plaintiff, as his legitimate son.

(Signed) S. SUNKARA, *Sastree.*

Remarks.

See Mitacsh. on Inh. ch. i. sect. xii. and Dig. vol. iii. p. 223. C.

The son is interested in his father's property, nor can any incident of birth deprive him of this inherent right. Differences however will exist, according to the circumstance of the mother. If she were a virgin of the same

caste, the act of connexion would be equivalent to the ceremony of marriage; and the offspring would be entitled to a full share. Not so, if of an inferior one. A degraded caste in the mother degrades the offspring; but still it is entitled to a maintenance. With respect to Sudras, (all the tribes of which are, in law, nearly equal,) I am inclined to think that sons, of whatever description, are entitled to equal shares. E.

Common sense dictates that the natural children in this country, by kept women, who are a sort of inferior wives, should have some maintenance, which must be apportioned by reference to their wants, rank, and the amount of their estates. The bastards of Rajahs to the northward never pretend to claim a share; but they have food, and clothes, and are married by their brother, the Rajah; but then they serve him as peons, servants, slaves. They can have no right however to a share in any case. Such questions ought to be settled by a *Punchayat* of the caste's people. Any opinions upon them that we can pretend to give, must be open to error. There are different customs in different castes and places, which only the people of the particular castes can know exactly. T.(1)

In this case, I think the legitimate son is the sole heir to his deceased father's estate: nor do I believe the Hindu law, in any case, except in the instance of a Su-

(1) William Thackeray, Esq. deceased, late Member of Council at Madras.

dra's son by a female slave, recognises the heritable right of illegitimate children. The first in the series of heirs is male issue *(Putra)*. But whom does the law include in this term? To this I should reply, 1. The real legitimate son. 2. Next, son of the son, or of the son's son. 3. The *Putra-pratinidhi*, or substitute son. Again, of the *Putra-pratinidhi*, by the ancient law, eleven descriptions are recognised; and of these the *Pawner-bhava*, or son of the twice-married woman alone might, in some instances, be regarded as " a natural son," in one acceptation of the term. But, in the present age, of the eleven subsidiary sons, the adopted son, of the two descriptions technically called *Dattaca*, or the son given, and *Critrima*, or the son made, is alone approved by the law and general practice. What constitutes a legal adoption, is a question involving many considerations, and which will not be here relevant. S.

ZILLA OF VIZAGAPATAM.

May 8, 1804.

A man having an illegitimate son, whom he had educated and married, had afterwards children born in wedlock; and conceiving an aversion to the former, he turned him out of his house, denying his having any claim upon him. The case being referred to the Pundit of the Court, his opinion was, that the son in question being neither *Datta* nor *Aurasa*, (neither legitimate nor adopted,) and no other being inheritable in the Cali age, he could enforce no claim on the property of his putative father; that it was nevertheless competent to the latter, if he thought proper, to admit him to a share, and this without the consent of his legitimate issue; and that, provided he was free from vice, he could not, without violating the Sastras, refuse him food and raiment.

Remarks.

Issue by a concubine is described in the law as son by a female slave, or by a Sudra woman. If the father were a Sudra, he might have allotted a share to his illegitimate son. Mit. on Inh. ch. i. sect. xii. And the obligation of affording him the means of subsistence is declared in passages quoted in Jagannatha's Digest. vol. iii. p. 170. C.

How does the Pandit discover that this illegitimate son was not *Aurasa*, or son of the bosom? Why should

this term include only the son of a woman consecrated by the nuptial rites? and, if it do not, what becomes of the reasoning? It does not mean only the son of such a woman; for, if it did, the progeny of a *Gandarva* marriage would be excluded from succession; which, by the primeval law, they certainly were not; for, to avoid quotations, whether from the Smritis, or their commentators, did not the son of *Dushmanta* and *Sacontala* succeed to his father's throne? Not to pursue this strain any further, it may be safely asserted, that, to establish illegitimacy under the Hindu law, the circumstances must be implicitly stated; (we must have the thing before us, not the name;) and that nothing short of absolute degradation from caste is an exclusion from heritage. Even in this case, maintenance is positively enjoined. E.

The *Aurasa putra* (literally, son of the breast) is described as the son begotten by a man on his lawfully wedded wife. Is a *Gandharva* marriage legal or illegal? If legal, the offspring of such a marriage would be legitimate; and, no doubt, the right of succession would arise. S.

MADRAS.

Sudder Adawlut.

Question.

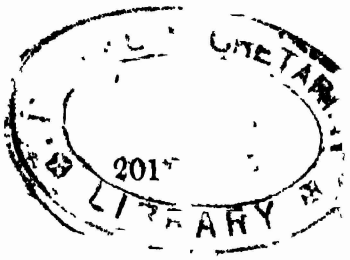
Has an illegitimate son any, and what hereditary right?

Answer.

His father may settle a share upon him, if he make partition in his life.(1) On the death of the father, without partition, he takes, with his legitimate brothers, a half share.(2) If none, he is entitled to a share equal to that of a grandson, by a daughter.

Remarks.

(1) See Mit. on Inh. ch. i. sect. xii. 1. and 2. (2) Provided the father do not belong to one of the three higher tribes: for this rule is restricted to the Sudra. 3 Dig. 143.



MADRAS.

Sudder D. Adawlut.

Has the son of a Brahmin, begotten on a Sudra woman, any, and what claim on the estate of his father?

Answer.

To the extent of food and raiment.

Remarks.

Provided he be of good conduct, and, as expressed in the Mitacshara, (ch. i. sect. xii. 3.) *docile.* C.

The Court would presume the natural son qualified to to receive maintenance, unless the opposite party could shew what, in the contemplation of the law, is a legal disqualification. S.

ZILLA OF CUDDAPAH.

July, 1807.

Sashumma, *v.* Somannah.

The Plaintiff is the childless widow, having been the second wife, of Padda Lingapah, deceased, who had a son by his first wife, now about eleven years of age, having maternal relations. The deceased, when dying, expressed a wish that his brother Chinna Lingapah should bring up his son. The questions are, 1. Who is entitled to the deceased's property? 2. To whose care will it be fit that his son should be committed during his minority?

Answer.

His son is entitled to the property, subject to the rights of the two widows, who have a claim to as much as may suffice for their food and raiment, with a reasonable allowance to them for alms; and, beyond this it does not extend, however considerable the estate. 2. The deceased, when dying, having expressed a desire that his brother should take charge of his son, the latter, if so inclined, may live with his uncle.

Remarks.

The son is no doubt heir, and the widows are entitled to maintenance. See Mit. on Inh. ch. ii. sect. i. 20. It belongs to the Court, representing the sovereign, to pro-

tect the rights of a minor. There is very little in the Hindu law on the subject; and a testamentary appointment of a guardian is not noticed in it. The latter part of the answer is therefore not founded upon particular law, but only expresses the Pundit's sentiments, as to what may be done in the exercise of the Court's discretion.

C.

"*And beyond this it does not extend,*" &c. No; not if sons be alive, or daughters either. E.

PROVINCIAL COURT OF CHITTORE.

The child in question (a female one) is an orphan, having lost both its parents. There survive, connected with her, her maternal grandfather, paternal aunt, and a cousin of her father. Who, of the above three persons, is, according to the Hindu law, the proper one to take charge of her?

Answer.

The father's cousin.

Remarks.

The Pandit's opinion in favour of the cousin is founded upon his being a *Sapind* of the father. The Raja, however, or sovereign, is the legal guardian, (Jagannatha's Digest, vol. iii. p. 542.) and may compel any of the child's relations to take care of her; the charge devolving on the paternal male kindred, rather than on a maternal ancestor, or females.(1) C.

(1) See 3 Dig. 544.

ZILLA OF COMBACONUM.

June 27, 1809.

The lands belonging to the Plaintiff, an infant of eight years, (suing by his guardian,) were mortgaged by his brother-in-law, without the privity of any one belonging to him. Is the mortgage good?

Answer.

It is not.

(Signed) P. VENCOO, *Sastree.*

Remark.

The brother-in-law could have no authority to interfere in the minor's affairs, unless acting as guardian to him with the approbation of the sovereign, who is the legal guardian of all minors. C.

ZILLA OF MADURA.

Question.

The father being dead, at what age is his son liable for his debts?

Answer.

Not till after seventeen.

(Signed) SASHADREE JYENGAR.

Remarks.

The son is of age at sixteen years complete, or at entrance on his seventeenth.

Jagannatha, in his Digest, says the sixteenth year, or end of the fifteenth, overlooking several authorities which are express as to this point. (Dig. vol. i. p. 293.) Thus Vireswara, the commentator of the Mitacshara, says, "a youth is independent immediately after sixteen years." Bhavadêvi, commenting on a passage of Vrihaspati, concerning performance of penance by a boy under sixteen, observes, "a boy above eleven years, to "the end of sixteen, must be here understood." Herenat'ha, author of the Smriti sara, expounds the words "after the minor has passed adolescence," in a passage of Catyayana, as signifying above sixteen years. And Raghunandana, the great authority of Bengal, says, "one who has not arrived at years of discretion, is one "whose age is less than sixteen years." C.

ZILLA OF CUDDAPAH.

June 9, 1807.

Soonkoo, *v.* Gooroovadoo.

The petition states, that Ellaloo, the father of the Defendant, borrowed of the petitioner jewels, upon which he raised money by pawning, for payment of a debt to the Circar; and that he is since dead, not having returned them as he engaged to do. The Defendant, in answer, alleges that his father *kept* the petitioner; and, it is in evidence, that, possessing, as she did, a separate house, the deceased was in the habit of visiting her, night and day. He further alleges, that he was not maintained by his father, but by a maternal uncle; and that he is at this moment but a boy. This is so: at the same time, it is in proof that he rents the arrack farm, which his father held before him. Under these circumstances, is he answerable for the jewels in question?

Answer.

It is said by Vrihaspati, and in the Smriti Chandrica, that a son is not of age till sixteen. Other authorities say not till seventeen or eighteen. In the present case, as the Defendant, from holding the arrack farm, must be considered as equal to the carrying on of business, he should be held answerable.

Remarks.

The whole current of authorities fixes majority at sixteen years, which Jagannatha and Servara, compilers of digests, explained to mean the entrance on the sixteenth year; but which elder commentators, of greater weight, understand to mean sixteen years complete.

A son is bound to pay his father's debts. (Digest, vol. i. p. 267.) It is observed, however, by Sir William Jones, that, without assets, the obligation is a moral and religious, not a civil one. Note on Digest, vol. i. p. 266. C.

ZILLA OF CUDDAPAH.

Nov. 13, 1807.

G. Chenchoo, *v.* J. Latchumorah.

The Plaintiff, a minor, of thirteen years, complained that the Defendant having adopted him, subsequently adopted another, and had since turned him out of doors. The reference to the Pandit was, as to his competency to call the Defendant to an account in judicature, being a minor only. The Pandit reported him as not competent, till he should have attained the age of sixteen complete.

Remarks.

He may sue through his guardian, or *prochein amy*, Vyása and Vrihaspati, (cited in various compilations,) having declared that a kinsman may institute and defend suits for a minor, a woman, an idiot, or insane person, &c.; upon which commentators have observed, that, whether delegated, or not, a well-wisher of persons, so incapacitated, may plead on their parts.

C.

ZILLA OF COMBACANUM.

October 14, 1808.

Samavien, *v.* Shistnien.

In this suit on bond, the Defendant having been sent for by the Court, and appearing to be an infant of ten years only, the Pandit (Vancoo Sastree) having been referred to, as to the course to be pursued, reported against proceeding in the action.

Remarks.

According to Nareda, and many other authorities, a minor (explained in the Smriti Chandrica to be one who has not completed his sixteenth year) can neither be arrested, nor summoned to answer a suit: and a trial, in which a minor, or insane person, is plaintiff or defendant, is pronounced to be wrong, by the Mitacshara, and other commentators on Yajnyawalcya. A kinsman, however, being a well-wisher of the minor, &c. is, by a passage of Vrihaspati, authorized to institute and defend suits on their parts. In the silence of the law, the courts must discriminate cases, in which the suit should proceed, defended or instituted by a friend, or guardian; and those in which it must be postponed, until the minor come of age. C.

ZILLA OF COMBACONUM.

January 22, 1808.

Ramasamy Jyen, *v.* Sachappien.

The Defendant in this cause being superannuated, and unable to speak; may his son be sent for to come and carry it on?

Answer.

The son of a man in such a state may be sent for to carry on the cause.

(Signed) VENCOO SASTREE,.*Pandit.*

Remark.

Vrihaspati says, "A man occupied with sacred lite-
"rature, engaged in the celebration of nuptials,
"afflicted with disease, oppressed by sorrow, insane,
"under age, intoxicated, old, sued by another, busy
"in the king's affairs, or engaged in austerities; a war-
"rior, while war depends; a husbandman during sow-
"ing and reaping; and persons involved in straits;
"must not be arrested: nor a woman; nor any person
"who is dependant on a master."

The author of the *Viramitiódaya*, commenting on a similar passage of another legislator, observes, "These
"persons must be summoned at a subsequent time.
"But, if an immediate citation be indispensably neces-
"sary, the son, or other representative, should be sum-
"moned."

The opinion is therefore correct. C.

APPENDIX TO CHAP. V.

ZILLA OF CUDDAPAH.

B. Latchemucha, *v.* Visvanada.

The parties being Brahmins, the Plaintiff is the wife of one Kistnavanee; the Defendant, his brother. At the time of the departure of Kistnavanee from his family, hereafter mentioned, he, and Visvanada (Defendant) having divided their property, each was in possession of his share in severalty; when, in consequence of a bad understanding between Kistnavanee and his wife, (the Plaintiff,) she quitted him, carrying with her two of their sons; upon which he took a second wife. Having subsequently assembled his caste, he procured from them a *samakya*,(1) as a means of constraining her to give him back his sons. This not producing the desired effect, he applied to the priest of the family for a divorce, which was refused, the Plaintiff not being chargeable with any crime. Under these circumstances he subsequently disappeared; nor is it known, with certainty, whether he be now living or dead. On the eve of his withdrawing, he deposited with his brother (the Defendant) the Sunnuds of his *Meerassee*, directing him to continue cultivating his *Mauniums*, accounting from time to time for the rents

(1) A writing with many signatures to it.

and profits to his *second* wife. He farther directed that, in the event of his *first* restoring his sons, the usual ceremonies being performed for them, they should be taken care of; and that, in this case also, their mother (the Plaintiff) should have food and raiment. Latchemanah, the eldest son, having since come of age, the question is, whether the Plaintiff and he ought not now to be put in possession of the property, the same as if Kistnavanee were dead; or, whether it should be allowed to remain as it is, with the Defendant Visvanada.

Answer.

The property appearing to be ancestral, it vests in the sons, in the absence of the father, subject to the claim of the wives to be maintained. In the event of any disagreement between the sons and their stepmother, the magistrate should interfere, and secure the latter in a reasonable maintenance. Should the father return, it will revest, and, should he and the sons afterwards disagree, they may come to a partition, he concurring.

Remarks.

According to the Mitacshara, sons have interest in the patrimony by birth; and, in property ancestral, have an equal right with their father. (Mit. on Inh. ch. i. sect. i. 27. and sect. v. 3.) The sequel of this opinion, regarding the arrangement to be made in the absence of the father, supposed to be dead, is consistent with the law: but the son's concurrent interest in the patrimony would not be a reason for disturbing an ar-

rangement made by a father to provide for his absence, if there were reason to believe him still living. C.

The opinion here given seems reasonable enough. The presumption that the husband is dead does not seem to have been yet formed.

As to the question, whether sons have a right to ancestral property, (immoveable,) such as to preclude the father from making any disposition of it, he may choose, it has been decided by the Sudder Adawlut in two cases, viz. in that of *Eshanchund Rai* v. *Eshorchund*, Beng. Rep. antc, 1805, p. 2; and in that of *Ramkomar* v. *Kishenkeenkar*, in 1812; that, in Bengal, a Zemindar may by deed settle the ancestral estate on one son, to the exclusion of the rest. I have, however, heard the law of these cases questioned. The contrary was determined in the case of *Sham Sing* v. *Umrastee* (a Tirhoot case), July 28, 1813, as the law according to the Mythila authorities. D.(1)

I should think the law must fix some period, if not direct, by analogy, within which the father ought to return. If it be to be fixed discretionally, his age and other circumstances should be considered, and a period settled, after the expiration of which the estate should be made over to the sons, and divided, if they wish it, between them. The father must be taken to have left

(1) William Dorin, Esq. one of the Judges of the Sudder Dewanny Adawlut of Bengal.

home as *Saniassy;* and, if he absents himself beyond a reasonable time, the business of the world, and of his family, must not suffer from his caprice. In the mean time, the estate might remain, as the father left it, in deposit, till the sons are grown up; i. e. supposing it to be in safe hands, and well managed. T. (1)

(1) William Thackeray, Esq. deceased; late Member of Council at Madras.

ZILLA OF VENDACHELLUM.

Sept. 9, 1807.

Penauka-Paty, *v.* Appauyangar.

The sons of a man possessing property inherited by him, claim a division of it, not including the land. The father not assenting, can they compel one?

Answer.

They can compel a division of the land only, according to the *Daya Bhagum*, of Jimuta Vahana; and *Agee vateva Bhagum*, (1) in Jagannatha turka-punchananum.

(Signed) SREENEVASA CHARLOO, *Pandit.*

Remarks.

The answer is expressed too broadly. Under particular circumstances, a division may be exacted by sons, against the consent of their father. Mitacsh. ch. i. sect. ii. 7. C.

"They cannot"—certainly not; the property, barring waste, is absolute in the father during his life. E.

(1) Signifying, division in the lifetime of the father.

ZILLA OF BELLARI.

May 29, 1807.

Turcapah, *v.* Mullashiah.

The Plaintiff is one of several sons of the Defendant, of whom, having been turned out of doors by him, he demands his share of the family property.

Is the Defendant compellable to acquiesce in his demand?

Answer.

According to Yajnyawalcya and others, a father, dividing his property among his sons, must allot to the eldest a larger share than to the rest; and, according to Vrihaspati, the wife shares with them, if not provided for by her parents. It is declared by Nareda, that though a son should be earning his own livelihood, not coveting what belongs to his father, still, on a division of property, an allotment should he made him, if only to bar his future claim. In the case referred, the Defendant is bound to allow the Plaintiff the share he demands.

(Signed) RUNGACHAREE, *Pandit.*

Remarks.

None of the circumstances, which could entitle a son to exact a partition from his father, (Mitacsh. ch. i. sect. ii. § 7.) appear to have existed in the pre-

sent case. The opinion delivered seems contrary to the law on that point, as well as in regard to the superior share of the eldest son; which Yajnyawalcya declares to be optional with the father in his lifetime; but which he is restricted from granting, if the property be hereditary; and which is altogether obsolete on a partition among brothers. Mit. on Inh. ch. i. sect. ii. § 1. 6. sect. 3. § 4. C.

"Is bound to allow the Plaintiff his share." If he thinks proper to divide his estate, he is so bound, not otherwise. All he is bound to do, during his life, is only to provide his son with a maintenance. After his death, the rejected son may demand a division from his brothers. A father's dominion over the family property is absolute, so long as he does not waste it; of which the magistrate will judge in equity.

Primogeniture has no force in the present age. E.

ZILLA OF BELLARI.

May 26, 1808.

Sarabiah *v.* Mulliah.

The Plaintiff sues for a division, his father being alive. Is he entitled to it?

Answer.

It is declared, byHaneeta, that, while the father lives, the son cannot interfere in the distribution or expenditure of money, in the making of gifts, or the punishing the servants when they deserve it, without the consent of the father. The present suit therefore is not competent.

(Signed) RUNGACHARY.

Remarks.

Under particular circumstances, a son may require a division. Mit. on Inh. ch. i. sect. ii. 7. C.

ZILLA OF GANJAM.

Can the sons, among the Wodday Brahmins, enforce a division of the family property, during the life of their father?

Answer.

It depends upon whether the property descended from ancestors; in this case, they may: otherwise, if it was acquired by the father.

Remarks.

Sons have a right in particular cases only to demand a partition even of ancestral property, during their father's life.—See Mit. on Inh. ch. i. sect. 2. § 7. and Id. ch. i. sect. 2. 7. S.

SUPREME COURT, CALCUTTA.

On the 18th August, 1781, and about a year before his death, Juggulkisson Addic, possessed of property, partly descended, and partly acquired, and having a wife and son, by will executed and attested, disposed of the whole in equal shares between them, and died, leaving them surviving him.—Upon reference to the Pandits of the Court of a long statement, of which the above is the substance,—they certified in favour of the will.

Remarks.

The doctrine of Bengal appears to be thus: A Hindu has absolute power in the disposition of moveables, however obtained, as well as of his own acquired real estate, whilst his property in the same endures. This is however terminated by his civil or natural death. His civil death is occasioned by degradation from his tribe, entering a religious order, and the like. Therefore, there are two periods for the partition of the property above-mentioned amongst his sons; one at his choice, whilst his property endures, another at the will of the co-heirs, or any of them, when his property has become extinct, as above described. The same principle is applicable to the real ancestral estate, with this difference;—The father has not absolute power over such property; neither can he, at his choice, make a

partition of the same, till the mother is past child-bearing. A partition made by his choice must however be equal; though he may preserve for himself a double share. While the ownership of the father endures, the sons can demand the partition of no description of property. S.

ZILLA OF BELLARI.

July 16, 1808.

Soobummah, *v.* Ginecapah.

On a question, as to the liability of the son to be sued, on account of property claimed by the father, the father living and amenable at the time, the Pandit (Rungachary) certified in the negative.

Remarks.

A son can only sue, or defend a suit for his father, unauthorized by him, if the latter be disabled by decrepitude, disease, alienation of mind; or the like. See a passage of Vrihaspati, as follows: " A kinsman " (explained by Mitra Misra to mean a son, or other near " relation), or any person who is delegated by the party, " may institute or defend causes on the part of one who " is an idiot, a madman, an old man, or one afflicted with " disease."—If the father have retired from worldly affairs, the whole management of the family devolves on the son; and in such case he may of course be sued.

C.

Right.—The father has absolute dominion during his life: the children have nothing to do with the property, or the claims on it, till after his decease. E.

ZILLA OF CHITTORE.

Dec. 26, 1810.

For the statement and questions referred to the Pandit, vid. post, Append. to ch. viii. p. 262.

Answer.

1. It is ordained in the Sastras, that a man living in the same country, offers *Pindu* (rice to deceased forefathers) as far as four degrees of descent; and he has therefore to that extent a right to demand a share of his ancestor's property; but that here it ceases, unless there have been an absence in a distant country, in which case it extends to the seventh degree. The claimant being of the fifth degree in descent from the first possessor, and not appearing to come within the exception, on this ground his claim fails.

(Signed) ALASINGA CHARIAR.

Remarks.

See Devala, cited in 3. Dig. 10; and Vrihaspati, Id. 440. C.

ZILLA OF VIZAGAPATAM.

August 25, 1810.

A man having two wives, with two sons by his first, and one by his second, during the minority of the latter, by deed divided his estate into four shares among his three sons and himself; retaining the share of his infant son, with whom he continued to live separately from the others till his death; subsequent to which another division took place, of some property that had remained before undivided. Upon this second division, it appears, by written evidence, that the mother received from his brothers their younger brother's share.—Is it competent to the younger brother, under these circumstances, to call for a new division?

Answer.

The division by the father was legal, and cannot be disannulled; nor can the younger son, who continued to live with his parents, dispute it. The deed executed upon the occasion is a bar to his present claim.

(Signed) DUSKY NARRAIN, *Sastree.*

Remarks.

The answer takes no notice of the supplemental partition, in which due care should have been taken of the minor's interests by his guardian; this appears however

to have been done by his mother (it must be presumed) in that capacity. The sons were of course bound, by the original partition made by their father, as far as that went; being conformable to law. 3 Digest, 547. texts xxxii. and xxxiii. C.

ZILLA OF COMBACONUM.

Sept. 9, 1809.

One Kistnama Naic, the father of Plaintiff and Defendant, thirty-six years ago, divided his estate between his two wives, establishing, by deed, two shares to one of them, and one to the other. The Plaintiff and Defendant, their sons, lived separately from that time, each with his respective mother; but, on the death of the father, they joined in performing his ceremonies.—Is it competent to the Plaintiff now to claim a new division, contrary to the one that so took place, as stated?

Answer.

The division made by the father, so many years ago, having taken effect, and it being lawful, according to some Sastras, for Sudras to divide their property between their wives, there can be no new division now.

(Signed) P. VENCOO, *Sastree.*

Remarks.

See remarks, p. However, long possession is also alleged. C.

The claim for a correction of the division (which is certainly disputable) ought to have been made before the property was taken by the respective parties. By not then urging it, it is inferable, that the father's disposition of his property was acceded to at the time. Without such acquiescence, he had, generally speaking, no right to make such a one. E.

ZILLA OF SALEM.

April 9, 1808.

Annapoornyummall, *v.* K. Avadany.

The Plaintiff, a widow with two sons, having, on the death of her husband, lived with the Defendant, her father-in-law, complains, that the latter has obliged her and them to quit his house; and she demands for herself and them maintenance from Nov. 1806, to July 1807, amounting, at ten rupees per month, to ninety rupees; and also a provision to be settled for their future maintenance, till a partition of Defendant's property shall be made, and her sons' shares assigned. To which the Defendant alleges, in answer, that he and his wife are very old; that they are unable to continue the support of the Plaintiff and her family; and that, after setting apart, out of what property he has, as much as may suffice for the marriage of his third son, and also for his and his wife's maintenance during their lives, and the life of the survivor, as well as for the expenses of their funeral ceremonies, he has no objection to the residue being divided.—*Quest.* What are the rights of the parties?

Answer.

The Plaintiff having two sons, and the Defendant pleading his inability, as stated, and agreeing to divide, a portion of his property, exclusive of the land, ought to be set apart for the marriage of his third son: then the land

should be divided into four shares; and, after allotting one for the support of the Defendant and his wife, the remaining three parts, together with the rest of his property, being divided into three, should be distributed as follows: viz. A share each should be given to the Defendant's second and third sons, and a share to his grandsons, the sons of his elder son deceased by the Plaintiff.

(Signed) SINGANA CHARIAR, *Pandit.*

Remarks.

This distribution of the property appears not to be correct. Admitting that the grandsons, or their mother on their part, might exact a partition, as the son might have done on his father's retirement from worldly affairs, (Mit. on Inh. ch. i. sect. ii. § 7.) still a father and his wife should not have been restricted to a single share for the maintenance of both, (Mit. on Inh. Id. § 9.) nor should he have been excluded from participation in the moveables, as seems to be done.

The appropriation made to defray the marriage of the son is consonant to an express direction to that effect, in case of partition after a father's demise. See note on Mit. on Inh. ch. i. sect. vii § 4. C.

APPENDIX TO CHAP. VI.

REMARKS BY MR. COLEBROOKE.

Accompanying Letter from him of May 18, 1812, (1) *on reference of question upon Adoption by Purchase.*

SLAVERY is fully recognised in the Hindu law; and the various modes, by which a person becomes a slave, are enumerated in passages, which will be found quoted in Jagannatha's Digest, (vol. ii. p. 224. and 228. 8vo. ed.) comprehending capture in war; voluntary submission to slavery for divers causes; involuntary, as in payment of debt, or by way of punishment; birth, or offspring of a female slave; and gift, sale, or other transfer, by a former owner.

Jagannatha proposes to include among slaves bought, received in gift, and made by stipulation, children given, sold, or made over for adoption, but not regularly or completely adopted by due performance of the prescribed religious ceremonies. If this interpretation were correct, it would be directly in point. But I find no authority for it in the earlier writers; and he himself acknowledges it to be entirely his own, expressing surprise that so apposite an interpretation should have been overlooked by preceding authors.

It is founded on a passage of the *Calica-purana*,

(1) Ante, p. 134.

the purport of which is, that children given, or otherwise made over for adoption, but whose tonsure, and the rest of the prescribed ceremonies, are not duly performed in the family name of the adopter, must be pronounced slaves. The genuineness of the text, as a passage of that *Purana*, has been questioned by some authors; and it is apparently not authentic, being wanting in many copies of the *Calica*, and bearing the look of an interpolation in those which do contain it, as it does not connect well with the context. But, being quoted by most of the compilers on the subject of adoption, many of whom are writers of great authority, it must be received (whatever may be thought of its authenticity) as the expression of a doctrine that has their sanction. The author of the *Dattaca Mimamsa* gives a careful exposition of the whole passage; and, coming to that part of it which conveys, that "if tonsure, and "the subsequent ceremonies be duly performed in the "family name of the adopter himself, then only do the "*Datta* and the rest become sons: otherwise they are "called slaves," observes, that "the *Critrima*, and "others, are comprehended under the term, 'the "rest;' for they become sons by those religious rites, "(*Sanscara*,) and not by mere acceptance. Otherwise, "that is, if tonsure and the rest of the ceremonies be "not performed, or if the taking be of one whose ton-"sure and other ceremonies have been already com-"pleted, a state of slavery ensues, not the relation of "son; for it is consecration that produces this filiation, "in like manner as a post is consecrated to be a sacri-

" ficial pillar." In his exposition of a subsequent part of the same passage, relating to the failure of adoption, if the child be past the limited age, the author remarks, " a state of slavery ensues, for there is not the relation " of son, and this is a third cause of a slave resulting." It appears then to be this author's opinion, that if the adoption fail, owing to the requisite ceremonies being omitted by the adopter, or being impracticable by reason of the child's age, or having been already performed, the child falls to the condition of a slave.

Were it not for this authority, I should have been disposed to consider the words of the *Calica-purana* as figurative, and intended merely to declare the adoption null, and of no effect.

A reference to that part of Jagannatha's Digest, that has been already cited, (vol. ii. p. 226. and 229. 8vo. ed.) will shew that the 2d and 3d of the Hindu tribes are not considered to be exempt from slavery; but the Brahmin alone.

I should not apprehend, however, that any difficulty will arise on this point, as the heirs of the deceased are not likely to prefer any claim to the person and services of the youth, as a part of the inheritance, and, if they did, there would be ground enough for rejecting it. Children becoming slaves, through a failure in the requisites of adoption, must be ranked in the most favourable class, that of slaves maintained in consideration of service; who are entitled to their immediate release, on relinquishing the maintenance. Jagannatha's Digest, vol. ii. p. 247. 8vo. ed.

BOMBAY.

Court of Adawlut at Broach.

If a child be stolen and sold, and the purchaser refuse to emancipate him, he should be liberated by the magistrate. But if the master, who claims, alleges that he purchased him from his parents, and proves this to the satisfaction of the magistrate, he cannot be set at liberty against the will of his owner.

(Signed)

SHASTREE NIRBHUYARAM.

Remarks.

Purchase from father or mother is a valid title. See Jagannatha, 2 Dig. 229. C.

BOMBAY.

Court of Adawlut at Broach.

One received, during a time of famine, into the house of another, and maintained, becomes thereby the slave of the person who so takes him in, not releasible by the magistrate. But, in the instance before the Court, the mistress (a dancing girl) offering to relinquish the boy in question, upon his aunt, the claimant, repaying her the expense she has incurred on his account, he may be emancipated, the magistrate being satisfied as to the relationship of the claimant.

(Signed) SHASTREE NIRBHUYARAM.
ROOP SHUNKIER.

Remark.

This is consonant to the passage of the Mitacshara, cited in Jagannatha's Digest, in commenting on a passage of Nareda, 2 Dig. vol. ii. 243. C.

BOMBAY.

Court of Adawlut at Broach.

One enslaved, in consideration of maintenance, on the amount disbursed for him being repaid, should be set at liberty; or, if stolen, and afterwards sold, on the price of his keep, and the purchase money repaid with interest, he should be emancipated. In the present instance, the maintenance and price of the boy in question being reimbursed, he should be restored to the claimant.

(Signed) SHASTREE NIRBHUYARAM.
ROOP SHUNKIER.

Remark.

According to the Mitacshara, one enslaved by force, and one sold (and also one pledged or given) by thieves, is released; so is he who saves his master's life. And certain slaves, on relinquishing maintenance, and reimbursement; *i. e.* a slave maintained in a famine, and one for maintenance, are emancipated on relinquishing maintenance, and repaying so much as has been consumed of the master's property from the commencement of their servitude. But the slave for debt, and one pledged, are emancipated by reimbursement; that is, on repayment, with interest, of the sum which the owner received when he pledged the slave, or that which the present owner paid to the former creditor, to redeem the slave from his

hands.—See Yajnyawalcya and Mitacshara, cited by Jagannatha, 2 Dig. p. 243. 246.

In this case, it does not appear under what circumstances the slavery in question arose. If by force, or sale of thieves, it is wrong to require reimbursement of maintenance. C.

BOMBAY.

Court of Adawlut at Broach.

A girl becoming a slave for subsistence is not liable to be sold by her owner to another, without her consent; and the matter coming before the magistrate, he must order her to be released. The right of sale is in parents.

(Signed) WALUBHRAM, *Sastree.*

Remark.

A slave for maintenance is emancipated on relinquishing that maintenance, and reimbursing the master his expenses. The right to reimbursement might be transferred to another master; but no other, or greater right, can be made over to him by sale, from the former owner. C.

ZILLA OF BELLARI.

Nov. 4, 1807.

Hoosany, *v.* Rungadoo.

The Plaintiff, a dancing woman, states, that having purchased from her caste people for four pagodas, a girl called Linghee, she brought her up; and that, on her punishing her for a fault, she quitted her, and has since been harboured by the Defendant, who refuses to give her up. She accordingly sues for restitution, and for damages for her detention. The Defendant pleads, that the girl came to, and remained with him, of her own accord, and that he is ready to redeliver her to the Plaintiff, but that she refuses to return.—What is the law upon this subject?

Answer.

There is in point of law, in this respect, no distinction between the girl in question and any other property purchased by the owner, who has a right to reclaim it, if taken, or improperly withheld from her. Willingness, or a want of it in the girl to return, makes no difference as to the right of the Plaintiff to have her back.

(Signed)

Remarks.

The answer treats the question as a simple one of slavery, or of purchased property. In general, the owner of a slave shall recover his property from the person in whose hands he or she may be. But, ought courts of justice to suffer themselves to be made instruments to enforce prostitution? And should not such an abuse of an owner's power over a slave, have the effect of barring the remedy at law? C.

The woman has a right to reclaim her slave, certainly. The Sastri seems to have believed the plea of the Defendant, that the girl refused to return; otherwise he ought to have given the damages sought for the detention. E.

APPENDIX TO CHAP. VII.

ZILLA OF CHINGLEPUT.

May 10, 1803.

To Pandit Kistnamachary.

The parties being the widows of two undivided brothers deceased, are disputing about the property of their respective husbands. On reference to the accompanying papers, you will give your opinion as to their several claims.

Answer.

Whether the estate possessed by the deceased brothers in their lifetime was inherited from their father, or acquired by themselves, while living together, they being dead, it is divisible between their respective widows in equal shares. Had it been an estate acquired separately by one of the two, it would have descended to his widow, exclusively.

(Signed) KISTNAMACHARY.

Remarks.

Presuming that the brothers died successively, this opinion is questionable. The heir to the brother who first died was his surviving brother; who, thus becoming

sole owner, would be succeeded by his widow. Mit. on Inh. ch. ii. sect. i. 39. C.

According to the Mitacshara, (ch. ii. sect. i.) the first widow would take her deceased husband's estate, only in the event of its being a separated share. But here the two brothers were unseparated; and, on the decease of one, his widow was only entitled to maintenance, the brother being the heir. On his decease, the property with regard to him having become separate, by unity of possession, his widow would succeed as his heir, the other widow being still entitled, as before, to her maintenance. D.(1)

(1) William Dorin, Esq. one of the Judges of the Sudder Dewanny Adawlut, of Bengal.

ZILLA OF CUDDAPA.

Veerakah *v.* Veneatanarnapah.

Case.

The Plaintiff is a widow, whose husband died in the lifetime of his father, no division of property between the father and son having taken place, and the son not having acquired any in his own right. The Defendant is the father, and the Plaintiff's own family are unable to maintain her.—What are her claims?

Answer.

Had the deceased left male issue, they would have inherited to their grandfather at his death, by right of representation. But no such right vests in the widow. She is entitled, however, to look to the Defendant, the father of her deceased husband, for maintenance; and, whatever she possesses as *Stridhana*, is her own.

Remarks.

Mit. on Inh. ch. ii. sect. i. and ii. C.

The opinion of the Pandit is correct. The widow is heir to her husband only where he dies separated from his coheirs, as well as without male issue. S.

ZILLA OF CHITTORE.

Dec. 17, 1810.

Case.

The *Calendar*(1) of a village adopted a son, who married, and died, in the lifetime of his father. The father subsequently died, having previously to his death given his *meerassee* in trust, for the support of a daughter, a sister, and the widow of his deceased son, who were all living with him at the time. And now the daughter-in-law claims it as hers. The Pandit (Ausoory Alagasingara Charloo) reported, that the disposition by the Calendar was a competent one, and the claim set up by the daughter-in-law not maintainable.

Remarks.

There was nothing in the law to prevent the man disposing of his property by gift, (which this trust is) for the support of the women, in any manner he judged proper. And even, had he made no such gift, still, according to the doctrine prevalent in the school of the Mitacshara, the daughter would have inherited, in preference to the son's widow; though the author of the *Vaijayanti*, and a few other writers, hold otherwise.

C.

(1) The *Calendar*, is he to whom belongs, in villages, the function of reading and expounding the *Punch-anga*, (compounded of *puncha*, five, and *anga*, members,) signifying a book treating on astrological subjects, under five particular heads. It is the province of Brahmins. Every Hindu village has one, who receives, as his compensation, a portion of the produce, which is called his *meerassee*. In some villages it is hereditary. Vid. ante, p.

ZILLA OF GANJAM.

Has a widow, whose husband died in the lifetime of his father, a right to claim a share of her father-in-law's estate? And, if not, ought not she to be maintained by her mother-in-law, the father-in-law being dead?

Answer.

It is ordained in the Saraswati Velasa, and Smriti Chandrica, in the chapter entitled Daya Bhaga, that a widow, whose husband has died, leaving his father surviving him, can have no right to claim a share of her father-in-law's estate, but only a provision for her maintenance. On the decease of the father-in-law, she must continue to be maintained by whoever succeeds to his property; and, failing other heirs, it is divisible between the mother and daughter-in-law.

Remark.

It is true that a daughter-in-law has no right to claim a share of her father-in-law's estate; nor does there exist any supposed case in which she could inherit, or participate in it. To make such relation an equal participator with a wife, is very erroneous.

ZILLA OF VIZAGAPATAM.

July 8, 1811.

A widow dying, left, surviving her, a brother and a daughter, and the brother performed her funeral ceremonies.—To whom does the property belong?

Answer.

To her daughter exclusively.

(Signed)

DUSKY NARRAIN, *Sastree.*

Remarks.

The brother's pretensions were grounded on passages of Hindu law, purporting that the succession to the estate, and the right of performing obsequies, go together. See "Remark" on a cause before the Sudder Dewanny Adawlut of Bengal, No. 14 of Cases before 1805.* See also Mit. on Inh. ch. ii. sect. ii. 6. C.

BOMBAY.

Court of Adawlut at Broach.

May 9, 1808.

A person having quitted home, and no intelligence of him having been received by his family, if he was from thirty to thirty-five years of age at the time of his departure, his return must be expected for twenty-one years, counting from the day he set out. If from forty to forty-five years, he must be expected for fifteen; if from sixty to sixty-five, for twelve: at the expiration of the respective periods, without any certain account of him having been received, his heir having performed three *chundrayunums*, must make an image of his missing ancestor, composed of twigs of the *Pulas* tree, or *Durba* grass, and burn it; after which, observing the ceremonies usual on death, he may take possession of his property: but, until the respective periods above stated be passed, the *missing* is the sole owner, nor can his heirs claim the inheritance.

(Signed) NIRBHUYARAM, *Sastree.*

Remarks.

Játacarna, quoted in the *Nirnáyámrita*, declares, "One whose father is absent, and of whom there is "no intelligence, must, after fifteen years, make "an image of him, and perform his funeral rites in "the prescribed form."—The *Grĭhyacáricá* is cited in the *Nirnaya Sindhu* for the following text: "If he

" be in the first period of life, the rites are directed after
" twenty years; if he be of middle age, after fifteen; but,
" in the latter period of life, after twelve. His sons
" having performed three *chandrayana*(1) fasts, or thirty
" austere ones, must burn an image of him made of *Cusa*
" grass, and observe the mourning and other rites."

C.

(1) *Chandrayana*, compounded of *chandra*, the moon, and *Ayana*, motion; and means *lunar month*.

ZILLA OF GANJAM.

June 5, 1805.

The deceased, a Hindu woman, possessed of land, having left surviving her only two nieces, and a grandson of a third, to whom does the land descend?

Answer.

As between the grandson of the deceased niece, and the surviving sisters, the grandson succeeds. The two who survived their sister, can have no claim, having no issue. It is held in the *Smriti Sindheeva*, in the chapter of *Daya Bhaga*, treating on woman's property, that a female, having no issue, shall never succeed to land. The same is repeated in the Smriti Chandrica, Saraswati Vilasa and Verderajah.

(Signed)

C. VARADACHARLOO, *Pandit.*

Remarks.

The opinion here delivered I regard as very inaccurate. See the erroneous doctrine, that women inherit only through having male issue, controverted in the Mitacshara on Inheritance, (chap. ii. sect. i.) Here the right of the grandson to succeed, can only be through his grandmother; therefore he can have no right to a larger share, than that to which she could have been entitled. In fact, however, I think he has no right to any share. The doctrine of representation does not apply to the case

of succession to the estate of an aunt, or great-great aunt; and the right of his grandmother had never vested. It is worthy of consideration, whether either of the three sisters could have any at all to succeed to the estate of their deceased aunt. In the series of heirs, the niece is nowhere enumerated; and my Pandit agrees with me, that the estate of the deceased would escheat rather than descend to nieces, and a *fortiori* to the grandson of a niece. S.

ZILLA OF BELLARI.

May 9, 1807.

Venkayah, Gungayah, and Chinna Venkarah,

v.

Godummah.

The Plaintiffs are the sons of three of five brothers, who formerly divided their estate. The Defendant is the daughter of Nileapah, one of the other two, by his first wife; after the death of whom he took a second, and died, leaving no issue by the two but the Defendant, who, having married and become a widow, the second wife of Nileapah, dying, left her property to her, consisting of gold and silver ornaments. The Plaintiffs claim to be entitled to it as heirs,—Was the gift good?

Answer.

It was not;—it not being competent to the Defendant to perform the obsequies of her father's second wife; and it is a maxim of the Shaster, that the person upon whom this duty devolves, is heir. The Plaintiffs, being the late Nileapah's fraternal nephews, have on this ground a right to the property in dispute; it being moreover further declared in the Shaster, that a fraternal nephew is preferable to a widowed daughter. The Defendant beside, not being the deceased's daugh-

ter, the property of the deceased cannot vest in her by inheritance.

Remarks.

This opinion, which would be nearly correct according to the doctrine of Jimuta Vahana, does not seem to be so according to that of the Mitacshara. It is not a maxim of the law, that he who performs the obsequies is heir; but that he who succeeds to the property must perform them. (3 Dig. texts cccclv. cccclvii.) The Mitacshara has not hinted at any exclusion of a widowed daughter, but only gives a preference to an unmarried one; or, failing such, to one who is provided for. The Defendant is not the deceased's daughter. But neither are the Plaintiffs her nephews. Besides, the jewels seem to have been her *Stridhana*, which she had full power to bestow as she pleased. C.

MADRAS.

Sudder D. Adawlut.

On the death of the Polygar of Ramnaad, he having been deposed in his lifetime many years before, for imputed rebellion against the Company's government, the *Rani*, his sister, through the collector of the district, claimed to succeed to any property he had left, she having, on his deposition, been placed by the government on the musnud in his stead. Her claim being referred to the Pandits of the *Sudder*, they certified that she was entitled, there not appearing to be any other claimant.

Remarks.

It does not appear to be Jagannatha's opinion, that sisters inherit in any case. Commentators on the Mirtacshaa allow the sister to come in, on failure of brothers. This opinion is however controverted; Mit. on Inh. ch. ii. sect. iv. § 1.(1) Perhaps this Polygar and family follow the peculiar customs of the *Nairs*, &c.; and, in that case, the sister would no doubt be the successor, in preference to any other claimant but her own son. *C.*

There was in this case another claimant, who, under a decree of the Court, has since succeeded, not merely to

(1) See M. Runnoo v. Jeo Rannee, Bengal Rep. ante 1805. p. 8.

the personal effects of the deceased, but to the Zemindary, to the exclusion of the adopted son of the Rani. This was the daughter of the Zemindar. The application for the old *Shetupati's* effects, made through the collector, was a manœuvre of the Rani to establish her claim to the succession, and consequently to the right of adoption, by getting possession of her brother's effects, and performing his funeral ceremonies. E.

The abstract question is, whether the Hindu law acknowledges the sister as an heir: and I am inclined to believe that it does not. S.

MADRAS.

Sudder Dewanny Adawlut.

Ramoo, serving in the Circar of Maha Tauker, had two sons; Kishn and Bramah. Kishn had a son named Lakshuman, and Bramah one named Bishn. At the death of Ramoo, in 1779, he left surviving him Kishn, Lakshuman, and Bishn, Bramah the father of Bishn having died in the lifetime of Ramoo. After Ramoo's death, Maha Tauker having settled the accounts respecting his arrears of pay, delivered a Cararnamah for the balance (Rup. 22, 937½) to Lakshuman, the son of Kishn, who took upon himself to sell it, his father Kishn and his cousin living at the time. The rest of the property, left by the deceased, came into the possession of Kishn and Lakshuman. Kishn is since dead, as is also Bishn, leaving a sister. The question is, as to the sale by Lakshuman of the Cararnamah, without the consent of his father Kishn, or his cousin Bishn,—whether it was valid?

Answer.

It was not competent to Lakshuman to obtain and dispose of the Cararnamah in question, without the privity of his father and cousin, living at the time.

The sister of Bishn has no claim upon the estate of Ramoo.

(Signed) VINEATASA, *Sastree.*

The doctrine of the Mitacshara, that an unmarried daughter shall receive from the sons out of the father's estate a fourth of what would have been her allotment had she been male, is contrary to that of other writers: but, admitting that it should regulate the present case what would be the right of Bishn's sister? On the death of their father Bramah, out of his moiety of Ramoo's estate, the unmarried daughter would be entitled to one fourth of what her portion would be were she male; *i. e.* she would take one sixteenth of the estate mentioned. But if she be to share as a sister of Lakshuman, her allotment would be one-fourth. It would, however, be incongruous to allow this; indeed, were the principle admitted, she might possibly have to receive a smaller share than that to which she is entitled in right of her father. Thus, had Lakshuman six unmarried sisters, her portion would be only a thirty-second. On the whole, it appears to me, that a larger specific share than a sixteenth cannot be assigned to Bishn's sister, without regarding her as heir to that person; but this she certainly is not. S.

BOMBAY.

Court of Adawlut at Broach.

The magistrate shall never take the property of a Brahmin: so says Menu. Accordingly, in the case of Lala the deceased, leaving no heirs, but property, the magistrate must cause it to be expended in performance of his funeral rites.

Remarks.

See Mitacshara, on Inheritance, ch. ii. sect. vii. 5.

C.

Right—but the Sastree might have stated what was to be done with the surplus, after performing the funeral rites. The law referred to applies to a *real Brahman*, not to one merely reputed as such. To ascertain what a real one is, see the Mitacshara; and 2 Dig. 127.(1)

E.

(1) See also p. 308 of 1st vol of this work

BOMBAY.

Court of Adawlut, at Broach.

If a *Vanaprastha* (1) dies, his *Auchary*, or spiritual guide, is heir to his property. If a *Yati* (2) dies, his *Shishya* (3) succeeds. On the death of a *Brumacharee* (4) whatever he leaves is inherited by his *Dhurm Brata*, or fellow-worshippers. The report of the Pandits, proceeds to establish the right of the claimants to succeed in the case in question; from their blood-connexion with the deceased as nephews, in addition to their religious one.

(Signed) *Sastree* NIRBHUYARAM.
—— ROOP SHUNKIAR.

Remarks.

See Mitacsh. on Inh. ch. ii. sect. viii. 2. 6. C.

The opinion is right; except that there was no necessity, after having shewn that D. and H. Vijaya succeeded as pupils of the *Dharma Brata* of the deceased, to substantiate their claim further, by producing them as his nephews. This circumstance could add nothing to their right; and the proof of it therefore was superfluous. E.

(1) Compounded of *vana*, a forest, and *prastha*, a rock; on which he passes his life in the practice of austerities.

(2) A Sanyasse, or mendicant.

(3) The most religious of his pupils.

(4) A professed student of theology.

This seems to agree with the passages quoted from the Mitacshara; that is to say, so far as spiritual relationship goes. It is to be hoped, that the property of persons of this description is infinitely small. D.

The heir of the *Vanaprastha*, or hermit, in the first instance, is the spiritual brother, and not preceptor. Several cases of succession, amongst Sanyasis, have been decided by the Sudder Dewanny Adawlut. See particularly Gunes Gir *v.* Amica Gir, Beng. Rep. p. 145. S.

Copy of a Paper in the hand-writing of the late Sir William Jones.

In all classes, if a man die without male issue, the following is the canon of inheritance; and, on failure of the first named, the next in order inherits.

The wife, the daughters, the parents, the brothers, the son of a brother, the kinsmen within the seventh degree, the more distant kinsmen, the pupil, the fellow-student.

Vishnu.—The estate of a man, who leaves no male issue, goes to his wife; if he leaves no wife, it goes to his daughter; if he leaves no daughter, it goes to his grandsons, to his father, and then it goes to his mother.

2*d Yajnyau.*—Of a perpetual student in theology, of an anchorite, and of a hermit, (who are all civilly deceased,) the heirs are, in order, the virtuous pupil, and the brother in study, or he who has had the same preceptor.

On the rights of the widow.

Menu.—If the husband has been a coheir, and died before partition, his brother, and the next in order, inherit his *undivided* share; but his wife takes all his *divided* property.

Jimuta Vahana.—Whether his estate was divided or undivided, fixed or moveable, his widow inherits it. So *Raghunaudhana Sri Crishna*, and others, very properly make no distinction, where he legislators have made none.

Yajnyawalcya.—Widows are declared to have a mere usufructuary inheritance in the estate of their deceased lords, and they must by no means alien or waste it, except for the necessaries of life.

They may however give part of it to a virtuous priest, through affection for their lords, in order to perform religious rites for his soul.

Vrihaspati.—In the Veda, in the written codes of law, and by the immemorial usage of men, the wife is declared by the wise to be half of her husband's body, sharing equally with him the fruit of good or bad conduct. As long as the wife lives, half his body is alive, though the other moiety may have perished; and, while half of his body subsists, who else can inherit the wealth? Even though his kinsmen exist, his father, mother, and brother, by both parents, yet if he die without male issue, by males in the third degree, his widow shall inherit his estate.

Mr. Justice Jones, after quoting Mr. Halhed's compilation, chap. ii. sect. xii. read his own translations of the original text, from which the first words in that section of Mr. Halhed's book are taken. Sir William Jones's version of them runs thus:—"After the civil or religious "death of the father, although the sons have an abso- "lute right to his property, yet, while their mother lives, "it is illegal for them to divide that property."

Sir William observed, that the word which he has rendered illegal, is - - - -, which seems to be equivalent to *inofficiosus* in Latin, and to import something more than *not right, or decent,* which is Mr. Halhed's phrase. I

means inconsistent with civil and religious duty. Sir William Jones then read his own translation of an extract from the sacred text of Menu (so he writes the name). It is in these words:—

"After the death *of both father and mother*, the bro-
"thers meet, and equally divide the paternal inherit-
"ance. While the parents live, they are not masters
"of it." Gloss.

From this text it appears, that the brothers of the whole blood must divide the fathers estate, *after the deat of both parents;* that they cannot, at their own pleasure, divide it, *while the mother is living*, but that a legal division may be made with her assent. If they are desirous of living together undivided, the eldest brother (being of ability to transact business and keep house) shall take her whole, and the other brothers shall live under him, as under their father. So is the text of Menu: "The
"eldest brother shall take entire possession of the pater-
"nal estate, the others shall live under him as under the
"father."

By S'RCRISHN'A TARCA'LANCA'RA.

Extracted from Mr. Colebrooke's translation of the Mitacshara, p. 224.

THE order of succession to the property of a deceased man, is this. First the son inherits; on failure of him, the son's son; in his default, the son's grandson. However, a grandson whose father is dead, and a great grandson whose father and grandfather are deceased, inherit at once with the son. On failure of descendants down to the son's grandson, the wife inherits: and she, having received her husband's heritage, should take the protection of her husband's family or of her fathers, and should use her husband's heritage for the support of life, and make donations and give alms in a moderate degree, for the benefit of her deceased husband; but not dispose of it at her pleasure, like her own peculiar property. If there be no widow, the daughter inherits; in the first place, a maiden daughter; or on failure of such, an affianced daughter: but, if there be none, a married daughter: and she may be one, who has, or is likely to have, male issue; for both these inherit together: but one who is barren, or who is become a widow having no male issue; is incompetent to inherit. On failure of the married daughter, a daughter's son is heir. If there be none, the father succeeds; or, if he be dead, the

mother. If she be deceased, a brother is the successor. In the first place, the uterine (or whole) brother; if there be none, a half brother. But, if the deceased lived in renewed coparcenery with a brother, then, in case of all being of the whole blood, the associated whole brother is heir in the first instance; but, on failure of him, the unassociated whole brother. So, in case of all being of the half blood, the associated half brother inherits in the first place, and on failure of him the unassociated half brother. But, if there be an associated half brother and an unassociated whole brother, then both are equal heirs. In default of brothers, the brother's son is the successor. Here also a nephew of the whole blood inherits in the first instance; and on failure of such, the nephew of the half blood; but, in case of reunion of coheirs, and on the supposition of all being of the whole blood, the associated son of the whole brother is in the first place heir; and, on failure of him, the unassociated nephew of the whole blood: or, on the supposition of all being of the half blood, the associated nephew of the half blood, is the first heir; and, on failure of him, the unassociated nephew. But, if the son of the whole brother be separate, and the son of the half brother associated, both inherit together, like brothers in similar circumstances. If there be no brother's son, the brother's grandson is heir. Here likewise the distinction of the whole blood and half blood, and that of reunited parcenery and disjoined parcenery, must be understood. On failure of the brother's grandson, the father's daughter's son is the successor: whether he be the son of the sister of the whole

blood, or the son of a sister of the half blood.(1) If there be none, the father's own brother is heir; or in default of such, the father's half brother. On failure of these, the succession devolves in order on the son of the father's whole brother, on the son of his half brother, on the grandson of his whole brother, and on the grandson of his half brother. In default of these, the paternal grandfather's daughter's son inherits; and, in this instance also, whether he be son of the father's own sister or son of the father's half sister: and, in like manner, [the whole blood and half blood inherit alike,] in the subsequent instance of the succession devolving on the son of the great grandfather's daughter. On failure of these heirs, the paternal grandfather is the successor. If he be dead, the paternal grandmother inherits. If she be deceased, the paternal grandfather's own brother, his half brother, their sons, and grandsons, and the great grandfather's daughter's son are successively heirs. On failure of all such kindred, who present oblations in which the deceased owner may participate, the succession devolves on the maternal uncle (2) and the rest, who present oblations which the deceased was bound to offer. In default of these, the heritage goes to the son of the owner's maternal aunt. Or, failing him, it passes successively to the son and grandson of the maternal

(1) The son of the proprietor's own sister, and the son of his half sister, have an equal right of inheritance; according to A'CHA'RYA, CHU'D'A'MAN'I. S'RÍCRÍSHNA, *Crama-sangraha*.

(2) The maternal grandfather inherits before his son the maternal uncle, according to the *Dáyatatwa* of RAGHUNANDANA and *Crama-sangraha* of S'RÍCRÍSHNA. See also 3 Dig 529.

uncle.(1) On failure of these, the right of inheritance accrues to the remote kindred in the descending line, who present the residue of oblations to ancestors with whom the deceased owner may participate; namely, to the grandson's grandson and other descendants for three generations in succession. In default of these, the inheritance returns to the ascending line of distant kindred, by whom oblations are offered, of which the deceased owner may partake; namely, to the offspring of the paternal grandfather's grandfather and other ancestors, in the order of proximity. On failure of these, the succession devolves on the *Samánódaeas*, or kindred allied by a common oblation of water. In default of them, the spiritual preceptor is heir; or, if he be dead, the pupil; or, failing him, the fellow-student in theology. If there be none, the inheritance devolves successively on a person bearing the family name, and on one descended from the same patriarch, in either case being an inhabitant of the same village. On failure of all relatives as here specified, [the property devolves on *Bráhman'as* learned in the three *Védas* and endowed with other requisite qualities;(2) and, in default of such,] the king shall take the escheat, excepting however the property of a *Bráhman'a*. But the priests, who have read the three *Védas* and possess the other requisite qualities, shall take the wealth of a deceased *Bráhman'a*.

So the goods of an anchoret shall devolve on another hermit, considered as his brother and serving the same

(1) See the note subjoined to this summary.

(2) *Crama-sangraha.*

holy place. In like manner the goods of an ascetick shall be inherited by his virtuous pupil: and the preceptor shall obtain the goods of a professed student. But the wealth of a temporary student is taken by his father or other heir. Such is the abridged statement of the law of inheritance. S'RÍCRISHN'A.

Remark by the Translator.

The son and grandson of the maternal uncle ought to precede the son of the maternal aunt, by the analogy of the rule of inheritance on the father's side. But three collated copies of S'RÍCRISHN'A's commentary agree in stating the order of succession as here exhibited. On the other hand the same author, in his original treatise on inheritance, entitled, *Carma-sangraha*, exhibits the succession on the mother's side in the following order: "First the maternal grandfather; next the maternal uncle; "then the maternal uncle's son; after him, the maternal "uncle's son's son; and subsequently the maternal "grandfather's daughter's son; [on failure of these, the "maternal great grandfather, his son, his son's son, his "son's grandson, and his daughter's son: again, on "failure of these, the maternal grandfather's grandfather, "his son, his son's son, his son's grandson and his daugh-"ter's son]."(1) It must be remarked, however, that the text of S'rícrishn'a's treatise, according to some copies of it, interposes the mother's sister's son between his maternal uncle and his son. But that is an evident mis-

(1) That part of the text which is enclosed between crotchets is wanting in some copies of the *Crama-sangraha*.

take; for the mother's sister's son is the same with the maternal grandfather's daughter's son, who is placed by the same author after the maternal uncle's grandson.

The author of the *Dáya-nirn'aya* states the succession differently: viz. "First the maternal uncle; then the "maternal uncle's son; next the maternal grandfather; "after him, the mother's sister's son; subsequently the "maternal uncle's son's son; and lastly, the maternal "great grandfather." He gives reasons founded on the number of oblations deemed beneficial to the deceased owner.

JAGANNA'T'HA TARCAPANCHA'NANA intimates the opinion, that the son of a son's daughter, or of a grandson's daughter, or of a niece, or of a nephew's daughter, are entitled to the succession before the maternal grandfather. (Digest of Hindu Law, vol. iv. p. 230; or vol. iii. p. 529, 8vo. ed.)

I find nothing else upon the subject in other writers of the *Bengal* school; and, amidst this disagreement of authors, I should be inclined to give the preference to the authority of S'RÍCRISHN'A's *Crama-sangraha;* because the order of succession on the mother's side, as there stated, follows the analogy of the rule of inheritance on the father's side. C.

APPENDIX TO CHAP. VIII.

ZILLA OF CHITTORE.

Dec. 26, 1810.

The owner of an extensive Jaghire died, leaving two sons, of whom the elder succeeded to it, the younger accepting some villages as his portion. The Jaghire is in possession, by descent, of the great-grandson (by adoption,) of the above-mentioned owner: and the great grandson, by the younger branch, now sets up his claim to a share of it.

1. Had the claimant's ancestor (the younger brother of the sons above-mentioned) a right to what is now demanded? And, does the claimant represent him in that respect?

2. Admitting the original right, how was it affected by acceptance of the villages referred to?

3. What is the law, as to the divisibility of a Jaghire?

For answers to the two first questions, vid. ante, Append. to ch. v. p. 224.

Pandit's answer to the third question.

As to the divisibility of a Jaghire, it is stated in the *Ramayanum*, *Bharadum*, &c. (ancient books,) that the crown was entailed upon the eldest son; the rest, pro-

vided with means for their livelihood, being left to conquer for themselves new countries. Though, by law, the kingdom might have been divided, yet, in their prudence, this course was preferred, it being thought, that if it was given to all, strife would ensue. Therefore, and as prudence prevails often against law, a kingdom is not divisible; it is so settled in many countries.(1)

(Signed)

ALAGASINGA CHARIAR, *Pandit.*

Remarks.

This is a very good opinion of *Alagasingara's*. His confounding the terms *Jagir*, and *Rajiyam*, does not detract from its merit; it only shews that he did not properly understand the former (foreign) word. A *Jagir* is a fief, (it may be hereditary, or not,) held under such conditions, and for the performance of such services, as the granter pleases to prescribe. The *Jagirdar* possesses no powers, except such as are necessary for the collection of the revenues in the country assigned to him, or such as may be specially conferred by the terms of his grant. Such tenure, therefore, can bear no resemblance to what the law calls *Rajiyam*,—the enjoyment of sovereign power, paramount or subordinate. The latter cannot be divided; for division would destroy it; and it is a maxim, that nothing shall be divided which would be destroyed by the act. But the effects and private estate of a sovereign prince

(1) Extracted from 2 Dig. 122.

may, and ought to be, divided, like the property of others, among his children. E.

The succession of Zemindaries has never been regulated by the common Hindu law of inheritance, but by the usage of the country, or the pleasure of government. Had they been divisible, we should not have found so many of ancient date still existing, as we do. T.(1)

(1) William Thackeray, Esq. deceased, late Member of Council at Madras.

MADRAS.

Sudder Dewanny Adawlut.

If a Hindu die, leaving property, can his eldest son, being of age, claim the outstanding balances due to his father, without previous application for the purpose to the coheirs?—Or, must he obtain a *Vakalutnamah* from them, to empower him?

Answer.

The elder brother should consult, on the occasion, such of his younger ones as are of age at the time.

Remarks.

An elder brother may certainly take the management of the whole, with the acquiescence of the coheirs; (Mit. on Inh. ch. i. sect. iii. § 3; and 2 Dig. text ix.) and if the objection be on the part of a debtor, pleading the claimant's want of authority from his coheirs, the plea would be bad; though it is presumed that, if he require, for his satisfaction and security, that all should join in an acquittance for payments made by him, he ought to have that satisfaction. If the objection be on the part of the coheirs, the elder brother (no doubt) cannot act for them, against their consent. C.

"Should consult," &c.—That would be very proper; but what answer is this to the Court's question? It was

meant to ask, whether it be necessary that the elder should receive a formal commission from the other brothers, or whether he may act without it? The answer is, that no formal commission is necessary. The elder brother succeeds naturally, as the representative of the father, to the administration of the estate; but, by common consent, any of the others may do so. In the latter case, a written agreement may be given; but the necessity of one is not even here absolute: the general notoriety of the fact is in all cases sufficient. E.

ZILLA OF BELLARI.

April 22, 1807.

Nedanapatee Vencapah, *v.* Rangapah.

The Plaintiff, an inhabitant of Taudaputtree, states, that the Defendant, in the year Durmatty, gave him a bond in the name of his elder brother Sernapah, for pagodas 1135, due on account of clothes purchased: to which the Defendant alleges in answer, that as he did so by the direction of his brother, who is living, the latter should have been made the Defendant. To this the Plaintiff replies, that they are an undivided family, and that the elder brother not being on the spot, and the Defendant having given the bond, though in the name of the elder brother, who received the goods, the action is properly brought.—*Qu.* Is it, under these circumstances, maintainable against the Defendant?

Answer.

According to the Sastras, applicable to an undivided family, the elder brother being alive, though absent, the younger is not answerable.

(Signed) RANGACHARLOO, *Pandit.*

Remarks.

This opinion appears to proceed on the ground of the elder brother being sole manager, and alone per-

sonally responsible for debts contracted on the common account. This would not, however, exempt the joint stock, and younger brother's share of it, from being answerable for the debt. The absence of the elder brother, independently of the circumstance of the debt having been contracted by the younger brother, in the name of the elder, rendered the younger, in this case, even personally amenable.—See 1 Dig. text clxxx. and following gloss. It would be otherwise, if the debt be taken to have been contracted on the separate account of the elder brother; in which case, the younger one would not be answerable, in consequence of the absence of the eldest, until the lapse of twenty years. See Id. text clxxv.

C.

Here the letter of the general law is applied, without discrimination, to a particular case. Where was the estate? Did it remain in the management of the younger brother? Whoever is in the management of the joint property, is answerable for all claims upon it, be he elder, or younger.

E.

ZILLA OF CHINGLEPUT.

March 31, 1804.

Of brothers, constituting an undivided family, how far has the elder a power to bind the rest by his bond?

Answer.

If an engagement by an elder brother for a debt specifies, that it is for himself and his brothers, and it appears that he had had the management of the family, it is in force against all.

(Signed) T. KISTNAMA CHARIAR.

Remarks.

Being the managing member of a family partnership, the elder brother had a power to bind his partners for a debt contracted for the concern: and his brothers will be bound by his act, unless they can shew that the debt, though purporting otherwise, was contracted for his separate interest; and that the lender was apprized that it was so. C.

Whoever has the management, elder or younger, binds by his acts the other parceners. E.

ZILLA OF CHINGLEPUT,

August 6, 1806.

Venkatakistnyengar, *v.* Narayen.

The Defendant executed a bond, to the Plaintiff's father, for a debt due to him by the father of the Defendant. At the time of executing it, he, (the Defendant,) his younger uncle Caulapa Reddy, and his elder uncle's son Tremala Reddy, were all living together in the same house, undivided: but, three years afterwards, they divided their property, and have since lived separate.

Under these circumstances, is the Defendant liable to pay the whole amount of the bond, or his proportion only?

Answer.

It appearing that the bond, given by the Defendant, for a debt due from his father to the father of the Plaintiff, was for so much borrowed for the common use, while Defendant's father, his brother Caulapa Reddy, and his other brother's son, Tremala Reddy, were living together as an undivided family, and that they afterwards divided, and since live separate, the amount of the debt, so secured, should be paid in the proportions in which the several parties divided the estate; and, consequently, the Defendant is answerable for his proportion only. It is so laid down in the section entitled *Renidana*, (title, Debt,) of

the second chapter, called the Chapter of Causes, in the Dherma Sastra, Vijnyaneswara.

(Signed) T. KISTNAMA CHARY, *Pandit.*

Remarks.

The action seems to have been properly brought against the Defendant; and the Plaintiff should have had judgment against him: leaving him to recover from his uncle, and cousin, their rateable proportions; the debt having been originally contracted for the common concern, and the payment of it not otherwise provided for on the partition.

But, if the son had not entered into a new obligation, the opinion delivered in this case would be correct: as, in such circumstance, the son is answerable only for his father's share of a debt contracted by him, when acting for his coheirs. See Jagannatha's Dig. vol. i. text clxxxii. C.

ZILLA OF CHINGLEPUT.

Kistniengar,

v.

Sreenyvassyengar and Vurdyengar.

The Defendants (brothers) divided their estate in 1787, as they pretend. It is proved that, in 1793, Vurdyengar having drawn the bond on which the action is brought, Sreenyvassyengar, the other Defendant, executed it for himself and coparceners; and that part of the money secured by it was taken up to defray the marriage ceremonies of Vurdyengar.

The question is, whether both are answerable in the action, or only one, and which?

Answer.

It appearing that the bond in question was executed by Sreenyvassyengar, for himself and coparceners, on account of money taken up for Vurdyengar's marriage, both are answerable for it, it not being proved that they had previously divided.

(Signed) T. KISTNAMA CHARIAR, *Pundit.*

Remarks.

See Jagannatha's Digest, vol. i. text clxxxi. The debt having been contracted during family partnership, in the name of the coparceners, for the common concern, (the marriage of a brother being a charge defrayable out of the joint stock,) it was no doubt recoverable from both brothers. C.

ZILLA OF CUDDAPA.

Latchemenada, *v.* Visvanada S——.

The Defendant, and the husband of the Plaintiff being brothers, and undivided, and their mother dying, the Defendant, in the absence of his brother, made a gift of land on the occasion of her death, equal to two *mercalls* of seeds, to one Annavaraloo Sashumbuttoo; he, the Defendant, being at the time in possession of the family property. *Quest.* Was the gift good as against the absent brother, unauthorized by him?

Answer.

Where one brother has the consent of the others for a present, a sale, or a mortgage, all will be bound by it. In the present case, the gift in question is, as against the absent brother, the same as if it had not been made, notwithstanding the doctrine, that a mother is to her son as a divinity; the effect of which is, that a gift of a man out of his own share, with a view to her salvation, on occasion of a sacrifice offered to her, will be a gift on good consideration: but the Defendant was incapable of making such a one out of lands the property of both, without joint concurrence.

(Signed)

Remarks.

See Mit. on Inh. ch. i. sect. i. § 28, 29. The gift being made for the spiritual benefit of a mother's shade, and, so far as appears, being not excessive for that purpose, according to the religious notions of the parties, seems to come under the description of indispensable duty, for which one brother is competent to make a valid gift, without the consent of the other,—it could not therefore be recalled. The action, however, does not appear to have been brought for this purpose, the donee being no party to the suit; but for that of charging the whole gift against the donor's share of property; in which view also the maxim cited from the Mitacshara is adverse to the Plaintiff's claim, which goes to disallow this disposal of property, as for the common concern. C.

If the husband of the Plaintiff had, during his lifetime, sued the Defendant, he might have recovered; as the bringing of the action would have implied that the alienation was made without his consent. Or, if the Plaintiff had proved, not merely that his consent was not given, but that he refused it at the time of the alienation, or disapproved the act as soon as he was informed it had taken place, then she would have been entitled to recover. But the Hindu law will infer that all charitable acts performed by one parcener, especially one so sacred as that which operates toward the "salvation" of the common mother, are performed on account of, and with the consent of the rest, the contrary not being shewn; and, in the present

case, the contrary is not shewn; as it does not appear that the then living parcener objected to the gift being by his brother, or that he disapproved of it at any subsequent period; had the alienation been made for any common purpose, not charitable, the inference of the law would have been directly the reverse of what I have here stated; it would have been that the absent parcener did not consent, unless the contrary were shewn; in this case it is that, unless the conrary be shewn, he did consent. The Pandit has not sufficiently considered these legal distinctions. E.

It may be remarked, in addition to the above observations, that, had the Plaintiff's husband been a minor at the time of the grant in question, it would have been clearly good, without his consent, which he would not, during minority, have been competent to give. (Mit. on Inh. ch. i. sect. i. § 28, 29.) It does not appear that he was a minor; but it is stated that he was absent at the time, which would be equally material, as connected with the occasion of the grant; being the death of the mother, whose ceremonies could not conveniently wait. Minors and absentees stand, in many respects, in point of Hindu law, on the same footing. T. A. S.

ZILLA OF NELLORE.

By the Pandit.

A younger brother is answerable for a debt contracted by the elder, whether for the support of the family, or for charitable purposes, or on account of their trade; provided the elder be dead, or absent in a distant country. But, all living together, the elder is alone answerable.

Remarks.

A debt contracted by any one brother, living in family partnership, for the support of the family, is binding upon all, in every case. But consent, express or implied, is requisite, in the case of one contracted in course of trade, or for charitable purposes.

The answer, in the present case, supposes the elder brother to be manager for the family. This might exonerate the person of the younger one, but not the property. See 1 Digest, texts clxxx. clxxxi. clxxxii. clxxxiii. C.

"Alone."—The person in management of the estate is answerable. This is not necessarily the elder brother. E.

MADRAS.

Sudder Dewanny Adawlut.

A Hindu, being in possession of landed and other property, died, leaving two sons, the younger a minor of thirteen years only, at the death of his father. The elder of the two, taking possession of the paternal property, proceeded to borrow successive sums of money, amounting, on a settlement of accounts with the lender, to a sum for which he gave his note, mortgaging, for the payment of it, the family property. The amount exceeds his share of that property. The younger brother was not privy at the time to the contracting of the debt; nor has he ever recognised its validity, so far as his interest is concerned. Neither does it appear that it was incurred on account of the family. Under these circumstances, is it chargeable, beyond the share of the elder brother, on the paternal property?

Answer.

The Sastree, Vencatasa, certified that, under the circumstances stated, the act of the elder brother could not prejudice the rights of the younger.

Remarks.

Extract from a letter (1813) from Mr. Colebrooke, to the then Chief Justice of Madras, upon a suit before

the Court, impeaching the transaction above alluded to;(1) and upon which the preceding reference was made to the Pandits of the Sudder Dewanny Adawlut.

On the subject of the question which you had lately before you, I entirely agree with you, that a mortgage, sale, or gift, by one of several joint owners, without the consent of the rest, is invalid for other's shares. In Bengal law, it is clear, that it is good for his own share; and for that only. In other provinces, it is as clear, that the act is invalid, as it concerns others' shares; and the only doubt, which the subtlety of Hindu reasoning might raise, would be, whether it be maintainable even for his own share, of undivided property. On the two first points, then, as stated by you, the law is undoubtedly as you have viewed it. On the third point, I take the law to be, that the consent of the sharers, express or implied, is indispensable to a valid alienation of joint property, beyond the share of the actual alienor; and that an unauthorized alienation by one of the sharers is invalid, beyond the alienor's share, as against the *alienee*. But consent is implied, and may be presumed in many cases, and, under a variety of circumstances, especially where the management of the joint property, entrusted to the part owner, who disposes of it, implies a power of disposal; or, where he was the only ostensible, or avowed owner; and, generally, when the acts, or even the silence of the other sharers, have given him a credit, and the alienee

(1) See Notes of Cases at Madras, vol. II. p. 329.

had not notice. I cannot refer you to authority beyond the passages to which you have already adverted, for this position. I rather consider it to be a point of evidence, what shall suffice to raise the presumption of consent, or acquiescence, than a matter on which the Hindu law has pronounced specifically; and I do not recollect any passages more express, than those to which you have referred, shewing that the alienation is invalid, as against the alienee. The case of Prannath, *v.* Calispunker,(1) to which you refer, was, I conceive, determined on the ground of implied consent; the land being answerable for the revenue, for which the managing owner had engaged, on the part of himself and sharers; besides other peculiar circumstances in the case.

(1) Reports in Sudder D. Adawlut, Bengal, previously to 1805, p. 49. 51.

ZILLA OF COMBACONUM.

Feb. 12, 1807.

Chandranader Moodeliar, *v.* Sashier.

Upon examination of the matter in dispute between the parties, it appears that Ramien, the Defendant's brother, borrowed from the Plaintiff two thousand gold *chuckrums;* and that, after his death, Nauna Jyen, another brother, let some villages to the Plaintiff, under an agreement to credit the rent toward liquidating the debt contracted by Ramier, and that, if a balance should remain finally due to the Plaintiff, he, Nauna Jyen, would execute a fresh writing for the amount. Nauna Jyen died three years after; and a balance remaining due, it is required to know, whether the Defendant be answerable for it, he and his brothers never having divided, though they lived separate.

Answer.

Though there never was any division between the Defendant and his brothers, yet, if the Defendant lived alone, unconnected with them, acquiring property independently of the paternal estate, or of aid from them,—distinct, not only in his dealings, but in his offerings also to their common ancestors,—or, if the debt contracted was not for the support of the family, he being connected with it,—in any of these cases, he is not answerable to the

Plaintiff for the balance, unless he should be in possession of assets, belonging to Ramien.

(Signed) VERNOO, *Sastree.*

Remarks.

See Yajnyawalcya and Nareda, cited by Jagannatha, 1 Dig. p. 282. text clxxx. clxxxi. and 3 Dig. text cccIxxi. C.

The circumstances here stated, and many others, indicate either division, or relinquishment of joint property, but do not constitute absolute proof of it. Notwithstanding the proof of such circumstances, the judge ought to satisfy himself that the separation was such as equitably to release the Defendant from responsibility for the acts of his coparceners. Admitting every circumstance indicating division, still, if it appeared that one of the parceners allowed the semblance of an undivided family to exist, either by occasionally asserting, or not denying it when asserted; and that a stranger, actuated by impressions so received, lent money, or formed contracts with the others, a parcener so acting, would be answerable for such debts, and must abide by such contracts. This applies, however, in strictness to brothers only; the natural connexion between cousins, &c. is not so great, and less, therefore, is required to establish their separation. Perhaps sometimes it may be incumbent on the claimant to prove their union, which, among brothers, the law infers.

E.

BOMBAY.

January 23, 1811.

Two brothers, possessing a house jointly, the elder executes a contract for the sale of it, in the name of himself, and his absent brother; and deposits it with a third person, on condition that it is to be delivered to the purchaser, on its being signed by the younger brother, and the purchase-money received. The younger brother objecting to sign, the purchaser still insists upon the benefit of the contract, as entered into by the elder, and sues accordingly.—Is he entitled to it?

Answer.

It depends on the age of the younger brother at the time. If he was of age, the claim is available only as against the share of the elder, who took upon himself to enter into the contract without the privity of his brother. But if the younger were at the time a minor, the property being undivided, the purchaser may enforce his claim to the full extent.

(Signed) VISTNU PANDOORUNG, *Sastree.*

Remarks.

This opinion seems to be grounded on the Mitacshara on Inh. ch. i. sect. i. § 29; but should be restricted, as it there is, to a case of indispensable necessity for the common interest. The purchaser must take care, that the purpose of the sale be such as will maintain its validity under the provisions of the law. C.

ZILLA OF CHINGLEPUT.

June 18, 1805.

Upon an application to the Court on the part of Vizayaragavienjar, son of Vurdienjar, for a division of family property belonging in coparcenary to himself and uncles, it appears that the complainant, having taken upon himself to dispose of a village belonging to the property in question, has appropriated the proceeds partly in the discharge of his father's debts, the remainder to other purposes foreign to the coheirs.

Answer.

Upon this statement, Vizayarajaviengar had no right to dispose of any part of the joint property, to answer either the debt of his father, or any purpose of his own, without the consent of his coparceners, no partition having been previously made.

(Signed) KISTNAMA CHARIAR, *Pandit.*

Remarks.

See Mit. on Inh. ch. i. sect. i. § 30. 32. None can dispose of joint property (especially immoveables) without consent of the sharers. But here the sale appears to have been without authority, general or special. In setting it aside on this ground, equity would require redress to be afforded to the purchaser, by enforcing a partition of the

whole, or a sufficient portion of it, so as to make amends to the purchaser out of the vendor's share. (1) It is presumed that the debt, stated to have been discharged, was one for which the coheirs were no way answerable; else the case would come within the exception in the Mitacshara, ch. i. sect. i. § 28. C.

"Had no right," &c. Certainly not. And the sale is valid, only so far as the seller's share in the property extended. Both the seller and purchaser are punishable criminally in this case; for the sale is fraudulent in one; and, subject to the contrary being shewn, the law will imply that it is collusive in the other. See the title of *Aswamivicraya*, sale without ownership, in any of the books. E.

(1) Vid. post, p. 421.

ZILLA OF CHITTORE.

The deceased, possessed of property according to the accompanying schedule, left at his death two wives, with one son by the first, and three sons and two daughters by the second.—How, according to Sastra, is the estate to be divided?

Answer.

There is *Patni bhaga*, and there is a *Putra bhaga*; and it is a question much disputed in books, which is the true rule of division. *Patni bhaga* is the division according to wives; *Putra bhaga* that according to sons. With some, as in the *Sarasvati Velasum*, it depends upon caste; *Basheacasloo* being said to have settled it, on comparing all the authorities, that, in the Brahmin caste, *Patni bhaga* should prevail, the widows taking equal shares with their respective sons; that, in the *Chatrya* they should have only what their husbands pleased to give them; and that, in the Vaisya, and Soodra castes also, *Patni bhaga* should be the rule, grounded with respect to these, on custom. The parties, in this case being Soodras, custom governs, not law, excepting so far as custom becomes law, in the extent to which it prevails, as it does in this case, superseding the Sastras; and the division accordingly must be according to *Patni bhaga*.

(Signed) ALEGARA SINGARA CHARY.

Remarks.

If the custom be as stated, the opinion is right. But the general doctrine is, that partition by allotment to wives, instead of their sons, only takes place when the number of sons by each wife is equal. See 2 Dig. p. 572. 575. texts lix. lxii. C.

"A question much disputed in books, which is the true rule." I know not that any authority admits *Patni bhaga* to be the "true rule." It is only allowed by some, and entirely rejected by others; this is all the "dispute" that exists about it.

Supposing (what does not appear) that the customary existence of *Patni bhaga* was proved to obtain in the particular, *Cula* of Sudras, to which the parties in the cause belonged, this opinion is correct; if not, not. The division by *Patni bhaga* must always be unequal with respect to the children of each *Venter;* for if there be two wives, and one son by either first or second of the two, he takes half the estate; and if there be a dozen by the other, they take no more among them. In the present case, dividing by *Putra bhaga*, the three sons would take each one-third of the estate, and the mothers and sisters would be jointly provided for: if by *Patni bhaga*, the son of the first marriage takes one-half, and provides for his own mother only, those of the second take one-half also, and provide jointly for their mother and sisters. If the order had happened to have been reversed, and the single son been of the second marriage, he, though the younger

brother of the four, would still have got half of the whole estate. These are the different effects of the two modes of division, which I have taken this opportunity of explaining; an explanation which, I think, clearly shews that no judge should allow of the division by *Patni bhaga*, if he can avoid it. E.

ZILLA OF CHINGLEPUT.

Jan. 29, 1807.

The parties are of the Soodra caste, and the deceased having died leaving two widows, with one son by one, and three, with two daughters, by the other;—How is the estate he has left to be divided?

Answer.

Any *bonâ fide* gift by the deceased in his lifetime, the jewels given to the girls, those worn by the wives, together with their clothes, the jewels worn by the sons, or their wives, being equal in value, and if not equal, enough being set apart to render them so; deducting all this, with as much as may be sufficient to provide for the weddings of the unmarried brothers and sisters, the remainder should be divided equally among the mothers and sons. It is true, that some, among the Sudras, first divide according to the number of widows, or mothers, and then subdivide the respective shares among the sons of each. A rule to this effect is laid down in the *Saraswati Vilasa*, sect. *Dayabhaga;* but not being founded on the Sastras, it is not to be followed.

Remarks.

With respect to the deductions to be previously made, see Mitacsh. on Inh. ch. i. sect. iv. 16. Dayabhaga, ch. vi. sect. ii. p. 127. and Jagannatha, book v. under

ccclxii. and cccclxxiv. With respect to the rule of division alluded to, considering the difference of opinion which appears to prevail, it would seem not to be a well established usage, to divide the property among wives, instead of sons. C.

The division of heritable property among the whole offspring, and not among the widows, (for example, if there are seven children and three widows, the division of the estate into seven shares, one for each child, instead of into three; *i. e.* one for each widow and her respective children), is the law of the Sastras; the contrary, however, is established in practice in many parts of these territories, as fully as is *Gavel-kind* in Kent; and is therefore properly admitted as legal, in the *Saraswati Vilasa.* E.

Note. The question involved in this doubt is as between *Putna Baugum*, and *Putra Baugum.* The former is, where the division refers to the mothers, and is *per stirpes;* the latter, where it is *per capita*, directly among the sons. And it seems to be *vexata quæstio.* Some, where there are several widows, contend for the right of each mother to share equally with her sons; but these are but few. Whatever be the rule, as it regards the sons, the widow, or widows, are to be provided for out of what has been left by the deceased, in the shape of maintenance.

The custom alluded to by the Pandit, is certainly contrary to the general law; as to its local prevalence, I of course cannot speak. In this case, the sons are the heirs of their father's estate; out of which they are bound to

provide for his widows, and the marriage of their sisters. In the Mitacshara, it is held that each widow should receive as maintenance a son's share; and that each unmarried daughter is entitled to a quarter of what her allotment would be were she male. According to this doctrine, supposing the two daughters unmarried, I imagine the estate would be divided into thirty-two parts, of which each son would take five, each widow as maintenance five, and each daughter one. S.

MADRAS.

Sudder Adawlut.

Aug. 9. 1808.

A Hindu, possessed of landed and other property, dies, having had two wives, by one of whom he leaves two sons, by the other only one. The sons disagreeing as to the division of the paternal property, it is required to know how it is to be made.

Answer.

In Jagannatha, (division of inheritable property,) it is directed that the estate, real and personal, left by the father, should be equally divided among all his sons.

(Signed) VENCATASA, *Sastree.*

Remarks.

See Digest, vol. iii. p. 74. book v. 52. C.

This is the law; but, in many parts of the Southern countries, the custom of dividing the property in equal shares to the *venter*, and afterwards equally between the sons of the several *venters* is so strongly established, that it must be allowed to supersede the general law. E.

Vid. post, p. 412.

CHITTOOR PROVINCIAL COURT.

March 18, 1811.

The deceased, a member of an undivided family, died, leaving three brothers undivided, and a son of about eight years, under charge of one of his uncles. The son, having come of age, calls upon his guardian uncle to account for his father's share of the property, which the uncle refuses to do, alleging that he (his nephew) is entitled only to share in common with his uncles and cousins. The estate remains undivided. What is the law?

Answer.

If the brothers of the deceased, and other kinsmen who are entitled to share the common property, have lived together in one house, dressing victuals together, and performing religious rites and duties in common, and eventually augmenting their means, whether by their joint industry, or by employment of the family stock,—in such case, after first discharging any debts that may be owing, what remains of the property of every description, viz. the live stock, precious metals, houses, lands, &c. is divisible equally. Brothers' sons take respectively their father's shares. The claimant is entitled to the share that would have belonged to his father.

(Signed)

Remarks.

The right of the nephew, to receive his father's share from his uncle, is explicitly declared in a passage of Catyayana; (cited in 3 Dig. p: 7. text lxxix.) and the power of any one of the coheirs to exact partition of the joint property may be gathered from the Mitacshara, and is distinctly affirmed by Jimuta Vahana, ch. iii. sect. i. § 16.

C.

ZILLA OF DARAPOORAM.

Dec. 22, 1807.

Coopanyengar and Romanyengar,

v.

Appanyengar and Terumalyengar.

The parties are brothers; of whom the Defendants are the two elder. Of the Plaintiffs, one is eighteen, the other only fifteen years of age. Their mother is living. The suit is for a partition.—Is it competent?

Answer.

Where any of the coheirs are at the time infants, their elder brother should maintain them, till they come of age, when they may demand their shares. The Plaintiff in the present case, who is only fifteen, cannot support a complaint against his elder brother.

(Signed) SANKARA, *Sastree.*

Remarks.

The sovereign, or his representative, as guardian of the minor, is competent to authorize a partition;—and an application to him, for his authority for the purpose, might constitute a suit. Nothing has been found in the law to prohibit the demand of a partition for the benefit of a minor.—3 Dig. p. 544. text ccccliii. 2. C.

ZILLA OF SALEM.

April 14, 1808.

Moota Butten,

v.

Linga B—, Kistnan, Vencatachellum, and Coopen.

The Plaintiff and Defendants being cousins, the former brought his suit for his share of the common property, descended and acquired: alleging that they had all lived together in one house as a united family till 1806, when, upon disputes arising among them, he had been turned out. On reference of the evidence in the cause to the Pandit of the Court, he reported as follows:

Report of the Pandit.

Upon consideration of the complaint of the Plaintiff, stating that his deceased father, and the father of the Defendants, were brothers; that he and the Defendants lived together till the 12th of *Audy* of the year *Atchin*, (1806,) in one house, as one common family;—that, subsequently, disputes arising between him and the Defendants, they turned him out of the house, and that they are accountable to him for his fifth share of the patrimonial estate, and of their own acquirements in addition; as well as of a house consisting of five compartments; also of the answer of Linga Butten, the first-named Defendant, (the others having admitted the claim,) alleging that the estate was formerly divided on the 23d of the month of *Aury*, of the year *Visvanasoo*, (1785,) in presence of their rela-

tions, by releases, putting an end to all future disputes and claims:—that afterwards, in the year *Nala*,(1796,) a dispute arising again, it was again settled; together with the declarations of some of the witnesses of either party, stating that it was true that formerly (the chests, bonds, and accounts excepted) the rest of the estate had been divided in five shares;—and of others, that when the division took place, the Plaintiff, being then an infant, his share was taken possession of, one half by Linga Butten, and the other by the other Defendants; adverting likewise to the release and documents delivered in by Linga Butten, in proof of the division:—It not appearing that the Plaintiff ever recognised the release relied upon by the Defendant Linga Butten, and there being no evidence that he has in fact ever received his share; added to which, two of his cousins (Defendants) admit his claim: according to Menu, Vijnyaneswara, &c. (Hindu Sastras,) the Defendants ought now to proceed to a division of the property in their possession, and give the Plaintiff his share, according to his claim.

(Signed)

Remarks.

It does not appear that the original partition would have been void, if the due allotment for the minor had been securely set apart, with the approbation of his guardian, or of the representative of the sovereign. In the case, as set forth, the share stated to have been set apart for the minor, in the hands of the Defendants, was never delivered to him by them; nor had the partition been ratified for him by his guardian. C.

ZILLA OF BELLARI.

January 25, 1808.

The parties, in this case, form an undivided family; of whom one, being the conicopily of a village, receives the *Mara Vurtanah*, *Bazar Vurtanah*, and other dues.—Is he accountable for them to his coparceners, notwithstanding he alone discharges the whole duty?

Answer.

It being declared that brothers undivided must, without reservation, equally share all the cattle and household goods left by their father, and the *Mara Vurtanah* being considered the same as household property; it follows that the perquisites in question are divisible.

(Signed) RUNGACHARY, *Pandit.*

Remarks.

If the office be hereditary in the family, the dues or profits appertaining to it must be subject to be shared. But in such case it classes with immoveables; and corodies, and the dues belonging to it, cannot be reckoned household property. C.

I doubt whether the *Mara Vurtanah*, &c. perquisites of office, granted for the performance of specific duties, can be "accounted the same as household property." On the contrary, it appears to me, that they cannot so be ac-

counted. For what is the real nature of them? Are they not given for the subsistence of the officer, enabling him to apply his whole time and attention to the accounts of the village; and would not the division of them among a number, for whose maintenance they cannot adequately provide, destroy their object? Again, does not the law that regards the grant of a corody apply to these and similar perquisites? and has not the grantor, or he who pays, a right to see that they are appropriated according to the original intention under which they are granted? I have no doubt but it applies, and that similar official perquisites, though certainly heritable, are not divisible; nor ought they to descend by primogeniture. The most capable of the direct, or in their default, of the collateral descendants of the first grantee, should be selected for the performance of the duties of the office, who should enjoy the whole perquisites. E.

Vid. post, p. 300.

ZILLA OF CHINGLEPUT.

Jan. 24, 1804.

'There being several brothers, constituting an undivided family, Government, in consideration of the personal services of one of them in particular, granted him a village in *Sotriyam*,(1) to be held by him and his posterity, with a restriction not to sell, alien, or otherwise dispose of it. The grantee being dead, leaving sons and daughters, a dispute concerning it has arisen between the eldest son and his uncles; and the question is, to whom it now belongs, whether to the lineal representatives of the deceased exclusively, or to them only in common with their uncles?

Answer.

The first and other sons are to enjoy the property in question equally, defraying, out of what they have, the necessary expenses of the family, and getting the daughters married. Property acquired by the deceased and his brothers, through their joint industry, or the use of their patrimony, which was in common, the latter are interested in, together with the sons of the deceased. For his separate acquisitions, they vest exclusively in his descendants.

(Signed) T. KISTNAMACHAREE, *Pandit.*

(1) From *Srotriyas*, learned teachers of the Vedas, 2 Dig. 290;—to whom, being Brahmins, belonged, not only the priesthood, but the office of judge also; (as with us formerly, *nullus clericus, nisi causidicus*;) and to whom, on these accounts, such grants were usually made. See vol. i. of this work, p. 308.

Remarks.

See Mitacshara, ch. i. sect. iv. 10. 31. C.

A *Srotriyum*, granted for public services, is an honourable reward to the individual, and an inducement to others to act as he has done. The honour and inducement are both lost, by its becoming the same as ancestral property, and being subject to endless division.(1)

Of divisible property the daughters would be entitled to a share, on division taking place before their marriage; but it does not appear that they can demand a division.

E.

The brother of the deceased Shotriumdar can have no claim upon any grounds. It was not ancestral property, but given by the Government as a reward for services to the individual. The Government never would have granted it, if they had thought an idle brother could have claimed a share. T.(2)

I am inclined to concur in the general accuracy of the Pandit's opinion; nor can I find any thing inconsistent with the grant, that the estate should be enjoyed by the heirs of the grantee, according to their legal interests. Any practical inconvenience, which in the course of time

(1) It would seem from this to have been Mr. Ellis's opinion, that the grant, on the death of the grantee, should enure, not to his heirs generally, but to a select one, according to the notion expressed by him, in his remark on the preceding Appendix, ante, p. 298;—upon which see Mr. Sutherland's, next page.

(2) William Thackeray, Esq. deceased, late Member of Council at Madras.

might be experienced, would be ascribable, not to the law, but to the want of explicitness in the grant. In the present case, the estate having been acquired by the exclusive exertions of the grantee, his brothers have clearly no right to participate in it. As to the interest of the unmarried daughters, doubt certainly presents itself. I cannot but regard, as more correct, more consistent with the genius of the Hindu law, the opinions of those writers, who merely admit the right of unmarried daughters, to receive from their deceased father's estate, what may be sufficient to provide for their marriage. Texts, however, of Menu, and Yajnyawalcya are adduced, which mention the fourth part of a brother's share as the unmarried sister's allotment; and Vijnyaneswara, in the Mitacshara, denies that the mention of a quarter of a share can be construed as used indefinitely, and as merely intending, that a sufficiency to provide for the daughter's marriage should be given. This author accordingly contends, that after the decease of the father, the unmarried daughter participates in the inheritance, receiving one-fourth of what would be her share, were she male. S.

ZILLA OF CHINGLEPUT.

Dec. 17, 1803.

The Plaintiff complains that the Defendants have usurped his turn of *Teertam* and *Prasadum,*(1) in the temple of *Vardaraja Swamy*. It appears that the grandfather of the Plaintiff was one *Sachen;* and that the grandfather of one of the Defendants, and the great grandfather of the other two, were brother and uncle to *Sachen.* It further appears, from written evidence, proved by the *Teertacarars* (2) of the Pagoda, that the Plaintiff has been in the profession and enjoyment of the right.—Is his action maintainable?

Answer.

It appearing that the Plaintiff and Defendants are cousins, not exceeding four degrees of descent, and that the Plaintiff has been in possession of the right he claims, he is entitled to it; but it should be enjoyed by him, with reference to the proportions of the respective ancestors of the parties.

(Signed) TREMALY KISTNAMACHARY.

Remarks.

The hereditary privileges of the family, with the income arising from them, are divisible among heirs, like

(1) *Teertam,* holy water, either of some sacred spring, or a mixture of liquids, in which the sacred images have been washed. *Prasadum,* holy food, prepared in the Pagoda, for the consumption alone of holy men.

(2) *Teertacarar,* holy men, entitled to partake of *Prasdaum.*

other patrimony, under the general rules of inheritance. At most of the religious establishments of the Hindus, and at their great temples, the various offices attached to them are considered as hereditary, together with the perquisites belonging to them. C.

CHITTOOR PROVINCIAL COURT.

August 2, 1811.

Upon a question as to the division of the jewels of the family, on a partition being about to take place;—it being stated that some of the individuals were in possession of a larger quantity than the rest, the Pandit, on reference to him, reported as follows:

As to the jewels, each female is entitled to retain whatever she was in the habit of wearing in her husband's time, or were given to her by way of dowry, *(Stridhana,)* whether by parents, brothers, uncles, or husband. Beyond these, *i. e.* with respect to what may have been made up out of the family stock, held in common, if there be no great difference among them in point of value, no account ought to be taken of the surplus. On the other hand, if the difference be considerable, *i. e.* if the value of the surplus jewels, possessed by some one or more of the women, greatly exceed those possessed by the rest, the whole excess should be divided.

(Signed)

Remarks.

Mit. on Inh. ch. i. sect. iv. § 19. and ch. ii. sect. xi. Also Jagannatha, 3 Dig. under texts ccclxii. cccclxxiv.

C.

ZILLA OF CHINGLEPUT.

March 7, 1807.

Vurdyengar, *v.* Alagasingyengar.

The parties, uncle and nephew, lived together in the same house as one family up to a certain time; when they separated, but without dividing. A division being now called for, the question is, whether it should embrace their subsequent gains?

Answer.

No division having as yet taken place, whatever has been acquired by the parties since they continued living together, is to be considered as a part of the common stock; and the division must be of all belonging to them at the time of dividing.

(Signed) KISTNAMA CHARIAR.

Remarks.

The common stock, however improved and augmented, is to be equally divided; but, if separate acquisitions have been made, to which the patrimony was instrumental, the acquirer is rewarded with a double share. Separate gains of specified sorts, to effect which the patrimony was not used, would belong exclusively to the acquirer. Mitacshara, ch. i. sect. iv. § vi. 29. 31. In the present case, it is presumed there were no such acquisitions. C.

MADRAS.

Sudder Dewanny Adawlut.

In an undivided Hindu family, by what means can one of the members acquire separate property, to the exclusion of his coparceners?

Answer.

He may do so, by carrying on cultivation, or by following any other pursuit, without using for the purpose the family estate. Property, so acquired, though by a member of an undivided family, belongs exclusively to the acquirer,—otherwise, if the paternal estate have been employed in the acquisition.

(Signed)

Remarks.

See Mitacsh. on Inh. ch. i. sect. iv. § 6. 10. 29.

C.

The answer leaves in the dark that which is most material to be known,—namely, what is the use of the paternal estate here intended by the law. With respect to the mere bodily labours of agriculture, they certainly may be carried on without such use, direct or implied. Many other occupations cannot be carried on, without at least an implied use. There exists considerable controversy on the point in the books; and many minute distinctions and limitations are made as to what is use, and not use; so that it appears to me to be one of the many points left

to the equity of the judge. Three rules are, I think, sufficient for his guidance. First, all property, inherited or acquired, is divisible. Secondly, the acquirer is entitled to an additional share of the property acquired. Thirdly, the judge must determine, on an equitable consideration of the circumstances of the case, whether the acquisitions of any of the individual parceners have been made without such use of the family property, as in law would render them divisible. E.

ZILLA OF SALEM.

May 17, 1808.

Seenewasa Chitty, *v.* Colletta Chitty.

The Plaintiff states, that he and the Defendant being brothers, and their father dying about four years ago, they lived together, till a dispute arising between them, and the Plaintiff in consequence demanding a partition, the Defendant, his elder brother, turned him out of the house. The petition of complaint states the patrimonial property, with the additions made to it since the death of the father, (consisting of ready money, fine gold, silver, house, &c.) as amounting to sixteen hundred pagodas; of which the Plaintiff demands a moiety, as his share.

The Defendant, denying the alleged amount of the property, says, that their father died indebted six hundred pagodas a great many years ago, leaving him at the time only six years of age, and his brother, the Plaintiff, only three; that he, the Defendant, begging about, and getting his meals at different houses, acquired learning, and a knowledge of business, and, having thereby gained some money, discharged his father's debt, married, was at the expense of his brother's marriage, and, in 1794, presented the latter with ten pagodas to set him up; that he, the Defendant, singly provided the necessary disbursements, and performed the ceremonies at the death of their mother; and that, from any acquisition made by the Plaintiff, he never had received a single cash.

It appears that the house referred to, having descended from the father, and being out of repair, was repaired by the Defendant; and that the quarrel alluded to originated with the Plaintiff; and the Defendant having upon the whole substantiated his case, while the Plaintiff has proved nothing, you are to say, to what extent the claim of the latter is to be maintained.

The Pandit, recapitulating the particulars, and commenting upon the respective allegations of the parties, as they stood supported, or otherwise, by evidence, gave it as his opinion, that the Plaintiff, instead of cordially adhering to his elder brother, who had supported him like a father, having quarrelled with, and thought proper to desert him,—and, with the exception of the house, it not appearing that there had existed any patrimony as the foundation and means of the Defendant's gains, or that he had ever received any thing from the Plaintiff,—the house and shop having been the property of the father, should be equally divided between them. That, beyond this, should the Defendant, out of brotherly affection, be disposed to give the Plaintiff any thing, it might be well; but that he had no right to insist on a partition, to the extent claimed.

(Signed) SINGARA CHARIAR.

Remarks.

The opinion, here delivered, is conformable with Vijnyaneswara's doctrine. See Mitacsh. on Inh. ch. i. sect. iv. § 10. C.

Under the circumstances of the case, as stated by the Judge to have been made out on the part of the Defendant, this opinion appears to be correct. The acquisitions of the elder brother were not in fact made by the use of the family property. The law will imply that they are so made; but when the contrary is shewn, they are not divisible. Had the Defendant been educated by the father, the case would have been different, for it must have been at the expence of the family, had it been so; and, in that case, *the acquisitions would by consequence have been family property.* E.

Qu. the position in Italics. T. A. S.

CHITTOOR, PROVINCIAL COURT.

May 29, 1810.

To the Pandit, Allega Singara Chariar.

You are hereby directed to take the following case into your consideration, and return your opinion, whether the three villages in dispute are to be considered as of the particular acquirement, and under what circumstances, of Babu Rajah, or as included in the patrimony.

The Case.

Calyana Rajah and Babu Rajah, represented respectively by the appellant and respondent, were descended from Rama Rajah, who, in his lifetime, was proprietor of two of the villages in dispute, namely, *Poodupakum*, and *Chatum Coopang*, possessing also the right of *Cauvel* in the districts of *Covelong*. About the time of his death, which is many years ago, one Virama Rajah, having joined the French during an engagement, took possession of these two villages, together with the privileges belonging to them. Calyana Rajah, and Babu Rajah having thus lost their patrimonial estate, they, in consequence, separated, and from that time till the death of Babu Rajah, (being a period of eighty years,) there ceased to be any intercourse between their respective descendants. Subsequent to the death of Calyana Rajah, thus separated, Babu Rajah having procured assistance from the Company, during Mr. Pigot's government, subdued Virama Rajah,

and recovered possession of the two villages, which had been formerly taken from the family. The third village, called *Ottyaporum*, he obtained as *Moohasa*, or free of rent, during the collectorship of Mr. Place. Under these circumstances, a share in them is now claimed by the descendant and representative of Calyana Rajah.

Answer.

If, during the time that Calyana Rajah and Babu Rajah were in possession of their patrimonial estate, it was seized by their enemy Virama Rajah, and subsequently recovered by Babu Rajah, without aid from the patrimony, he and Calyana having antecedently separated, the general conclusion would be, that it is Babu Rajah's, as of his particular acquirement. But, to be certain, it is necessary to know whether their separation took place with the intervention of relations and witnesses, with deeds of division; and further, whether the recovery subsequent by Babu Rajah was with the privity and acquiescence of the sons and grandsons of Calyana Rajah, or otherwise, and how. The acquiescence alluded to means a writing, purporting, "You will subdue back our patrimonial pro-"perty, which was seized and possessed by a stranger, "and enjoy it yourself. I shall expect no part of it." It is further necessary to know, with reference to a passage of Vyasa, (1) whether, in the re-conquest of the property in question, money, carriages, arms, or other things belonging to the patrimony were used, and in what,

(1) Cited by Jimutu Vahana, ch. VI. sect. i. 14.

if any degree; or whether the recovery were made exclusive of it. If, upon examination, it appears that Babu Rajah acted on occasion without the warrant or cession from the original coparceners, or their representatives, notwithstanding his merit, and continued enjoyment for a length of time, the property is still liable to division, more especially if obtained by means common to him and them; one-fourth being previously deducted, as his remuneration for the recovery. With respect to the village obtained during the collectorship of Mr. Place, the right to it, whether it is to be considered as sole, or joint, depends upon its having been acquired, or not, by the employment of the patrimonial property.'

(Signed)

ALLEGA SINGARA CHARIAR, *Pandit.*

Remarks.

The "acquiescence," spoken of by the Pandit, is required under the restriction stated in the Mitacshara, commenting on a passage of Yajnyawalcya. See Mit. on Inh. ch. i. sect. iv. § 2. Where no division has taken place, *i. e.* if the brethren were not separated in their interests and concerns, the patrimony which is recovered, is recovered to the use of all the heirs, allowing, however, a fourth, as remuneration to him who recovered it. See Sancha, cited in the Mitacsh. ch. i. sect. iv. § 3. C.

This is an excellent and very correct opinion of Allega Singaras; but it may be convenient to explain the general law upon which it turns. If, at the time an estate

is divided, any part of the assets belonging to it, in whatever shape they may exist, be not forthcoming, so as to enable an actual division of them to be made, either the parceners must come to some mutual agreement regarding them, prospectively to their recovery, or the right to such property will continue to rest in them jointly, their heirs and representatives, in the same manner as if no division had ever taken place. Hence the Pandit properly says, "it is necessary to know whether the separation "took place with the intervention of relations and wit- "nesses, with deeds of division," &c. It is necessary to know in fact the exact terms and agreements, under which Calyana and Babu Rajah separated; for, in this case, it is not sufficient to prove the mere fact of separation; it must be seen, whether any specification was made at the time, respecting the villages removed by the act of Virama Rajah, from the possibility of actual division. If it were said at the time, "whoever recovers the family property, "let him keep it," the question is at rest. If it was not so said, then Babu Rajah must be taken to have been acting for the joint interest, in the recovery he effected; the property so recovered, notwithstanding the division, remained joint property, being a portion of the assets that was never divided. In this view, he cannot be allowed to appropriate it to his own use; the villages retain their original character of joint family property, and are divisible among the surviving representatives of Rama Rajah, the common ancestor. As to the right of the representatives of Calyana Rajah, to cede their claim to Babu Rajah, if they chose to do so; that of Babu Rajah (by the

same rule that applies to the actual *acquirer* of property) to an addition to his share, under certain circumstances; with his sole right to the third village, obtained after separation from his brother;—these require but one remark; it is, that, if it can be shewn that he recovered the family property first, and used it to acquire the third village, this also becomes divisible, reserving to Babu Rajah his claim to a superior share. E.

ZILLA OF BELLARI.

December 22, 1807.

Tommee Reddy and Chenehoo Reddy,

v.

Narasimma Reddy and Bandy Reddy.

The parties, of the Sudra caste, are four brothers, comprising an undivided family, desirous of dividing. They have a mother living, and a sister; the latter married, and provided for. Proprietors of a village, the eldest managed the domestic affairs; the second those of the village, improving and augmenting the property. How is it to be divided?

Answer.

The sons should give a share to the mother; and a twentieth part should be deducted for him who has had the most to do with the ceremonies, and has added to the property. The remainder should be equally divided among them. The mother's share will descend to the daughter.

(Signed)

RANGACHARY.

Remarks.

The practice of allotting a twentieth part to an elder brother, besides his share, is obsolete; as is declared in

clear explicit terms in the Mitacshara, ch. i. sect. iii. § 4. And it is affirmed, that, if the common stock be improved by one of the joint sharers, an equal partition nevertheless takes place. Ibid. sect. iv. § 31. If one of them, however, had made any separate acquisition, his proper remuneration would be a double share of that particular acquisition; not a twentieth part of the whole.

The allotment of a share to the mother, at a partition among brothers, is directed by the Mitcshara, ch. i. sect. vii. § 2. The subject is more fully treated in the Chandrica, where it is shewn that her allotment, including what she already possesses, as separate property, is to be made equal to a brother's share. But the Smriti Chandrica, on one hand, and the Mitacshara and Madhava Acharya on the other, differ on the question, whether it be an absolute assignment of a share, or merely a setting apart of a portion for her maintenance. See Mitacsh. on Inh. ch. ii. sect. i. § 32.

Daughters succeed to their mother's property, after payment of her debts. Mitacsh. on Inh. ch. i. sect. iii. § 9. C.

The allowance of an addition to the active representative of the family, and the descent of the mother's share on the daughter, rest on authority; they are doubtful, however, the latter especially, as the daughter is married. This, however, has nothing to do with the present case. With respect to the division among the brothers, the better mode is, first, to divide the property

descended from the ancestors into equal shares; secondly, to divide what has been acquired by the possessors into unequal ones, giving a larger share to the acquirer; leaving the proportion to the common consent of the coparceners; or, in case of dispute, to the equitable discretion of the Judge; the law, though it mentions a specific proportion, intending it as an example, not as a precept. The Pandits in general do not understand this. E.

The best authorities regard the old law, respecting an unequal division amongst sons, as not applicable to the present age. S.

ZILLA OF CHINGLEPUT.

May 5, 1809.

Two brothers in the Canara Chitty caste lived together, as one family, possessed of several houses, lands, stock in trade, and outstanding balances. The younger, apprehensive that the elder was wasting the property, and thinking that, if he did not divide on the proposal of the elder, he might be a sufferer, a division took place, and he received his share.—Is a division, under such circumstances, valid?

Answer.

As the brothers appear to have divided freely, the division is good.

According to various passages in different authorities, treating of the division of property, there appear to be three distinct modes. 1. That of *Pracasa Vebhaga*, or public division, where it is made in the presence of the relations of the parties. 2. *Rahasya Vebhaga*, or private division, where a few only are present, as mediators. 3. The *Anyanya Vebhaga*, where it is by the mutual consent of the parties, not made known to any other.

(Signed) ALLEGA SINGARA CHARIAR,
Pandit of the Provincial Court.

Remarks.

This opinion is correct. The difference between the second and third modes is, that, at the *Anyanya Vebhaga*, (literally, division without a stranger,) none but the parceners are present when the estate is divided; and that, at the *Rahasya Vebhaga*, (private division,) a few friends and mediators only are present, and the circumstance is not generally published to the world. E.

ZILLA OF VIZAGAPATAM.

April 30, 1808.

Three brothers, deceased, carried on their concerns in their lifetime separately, in different villages, for between thirty and forty years. No releases appear among them, nor is there any written proof that they ever divided.—Are they to be considered as having divided; or, is it competent for their respective representatives, or any of them, now to call for a division?

2. Supposing them to have left only one son, with widows, to whom does their property belong?

Answer.

If there be suitable evidence, or visible marks applicable to a divided estate, it is not necessary that there should be a deed of division in writing. If sons, grandsons, or kinsmen have lived long separate, carrying on traffic, and other worldly concerns, without aid from the common stock, performing also religious ceremonies separately, there will be no ground for a division of such existing separate estates.

Of the property in question, any that remained undivided vests in the surviving son, to the exclusion of the widows.

(Signed) D. NARRAYANA, *Sastralu.*

Remarks.

The answer to the first question is correct., .Mit. on Inh. ch. ii. sect. 12. ch. i. sect. 9.

On the second question, a difference of opinion exists, whether an undivided residue shall be subject to rules of succession relative to separated, or unseparated brethren. Authorities are cited on both sides; but the opinion here given seems the best. C.

ZILLA OF VERDACHELLUM.

February 27, 1807.

Mootoosamy, *v.* Pachiapilla.

When the elder and younger brothers divide the estate, in whose presence, according to Sastra, should it be done? How many mediators ought there to be present? And what is the proper purport of the instrument of discharge?

Answer.

1. When a partition is to take place, the parties may, by consent, make it privately among themselves; or otherwise by the intervention of relations or neighbours; of whom the number may be seven, five, or three.

2. As to the form and contents of the instrument, it should recite the nature of the property, according as it is descended or acquired; and, in the latter case, the particulars of its acquisition should be stated. The respective sharers should be mentioned, and the articles allotted to each, specified. The name of the person to whom the instrument is given should come first. Then that of him by whom it is drawn, describing his father. The like description should accompany the signature of the parties, and the attestation of the witnesses. The year, month, and day, must appear. Thus should writings be reciprocally interchanged.

(Signed) SREENEVASA CHARLOO, *Pandit.*

Remarks.

1. This seems to be grounded on the passage of Vrihaspati, " Wherever seven, or five, or even three " Brahmins, versed in sacred and profane literature, and " acquainted with the law, sit together, that assembly " is similar to a meeting for a solemn sacrifice," or some like passage of another author.

2. See Vrihaspati, and the Comment of Jagannatha on his text. 3 Dig. 408. C.

A proper description of a *Vibhaga patrica*, a deed of division among coparceners. E.

ZILLA OF VERDACHELLUM.

November 30, 1807.

Jenintum Ammah, *v.* Chooliapadiatchy.

The parties are Soodras of the *Pullee* tribe. The Plaintiff's husband and the Defendant, being brothers, three years before the death of the former, divided their property, with the exception of a cat, a pillow, a carpet, and a writing-case; and, from that time, till the death of the former, lived separate, but still performing jointly *Pungall*, and the annual ceremony for their father. The Plaintiff's husband leaving no son, the Defendant performed his funeral obsequies; but under a protest, on the part of the Plaintiff.---*Qu.* Which is entitled to succeed to the property of the deceased?

Answer.

The Plaintiff's husband and the Defendant having continued to perform *Pungall* and *Tithy* jointly, the conclusion is, that no division ever took place between them; and the estate consequently of the deceased survives to the Defendant.

(Signed) SREENEVASA CHARLOO.

Remarks.

This would be a valid conclusion in a doubtful case. *Nareda* says, " When partition has been made, religious

" duties become separate." Mit. on Inh. ch. ii. sect. xii. § 3. The separate performance of religious duties is accordingly evidence of partition; and, conversely, the joint performance of them affords a presumption of family partnership in a doubtful case. Mit. on Inh. ch. ii. sect. xii. But, it appears from the statement made to the law officer, that, in this case, there was evidence of an actual partition; and the cause turned on a question of fact, which the Pandit assumes, from the circumstance above mentioned, against the evidence, to which the Court appears to have given credit. Joint performance of obsequies is not conclusive evidence of family partnership, against other and satisfactory proof of separation. As to the circumstance of a few articles remaining undivided, it would be no impeachment of a partition otherwise valid.

C.

Against a positive fact, of what force can be a mere conclusion?---If the act of division did indeed take place, the joint performance of the ceremonies after, (which might proceed from brotherly affection,) could make no alteration; and, as it appears from the case, as stated, that the fact of division was in proof, it does not make any difference in its effect. Had the division been doubtful, then certainly the joint performance of the ceremonies would be a conclusion against it; a conclusion merely, however; or, as it has been appositely called in another case, a " token," (*adyuharana*, I suppose, in the original,) not a proof.

E.

ZILLA OF CUDDAPAH.

July 9, 1807.

Veeranah, *v.* Vencatapah.

The parties are cousins, descended from brothers; the Plaintiff being the son of one Taulerajoo, the Defendant of Soobiah. The latter has three brothers. It is proved that Taulerajoo and Soobiah, in their lifetime, performed jointly their father's *Sraadums*, or ceremonies; and there is no evidence of a division of property having taken place between them.---Supposing the family to be liable to be considered as hitherto undivided, it is contended on the part of the Plaintiff, that the Defendant should account to him for the larger share, which he says he has enjoyed of the *Meerassy*, since the commencement of the suit.

Answer of the Sastraloo.

1. Joint performance of ceremonies implies union of interests; and it must be concluded that Taulerajoo and Soobiah lived and died undivided. It does not appear that the parties have divided since. No deed of division is stated. According to the accompanying extracts from Yajnyawalcya and Vrihaspati, if there are brothers, and they die, one leaving one son, a second two, and a third three; on a partition, the sons take respectively the shares of their fathers; *i. e.* the property being divided into three equal parts, the son of the first takes one, the

two sons of the second another, and the three of the third the remaining one. The estate in question, therefore, being divided by two, the Plaintiff being the only son of one brother, will be entitled to one moiety; the other will be the portion of the Defendant and his brothers, the four sons of the other.

2. From the moment of partition, each party enjoys his appropriate share. Parceners are not liable to account to one another for degrees of enjoyment of the common property, pending the suit, where the magistrate has been appealed to for a decision.

(Signed)

Remarks.

1. This is rightly presumed, there being no evidence of a division. Mit. on Inh. ch. ii. sect. xii.—For the rule as to representation on a partition, see Id. ch. i. sect. v. § 2.

2. If the enjoyment have been disproportionate, they may be liable to account. See 3 Dig. 392. C.

ZILLA OF VERDACHELLUM.

April 19, 1808.

Ruman, *v.* Vadamaly.

The parties, being cousins, have lived separate from one another these thirty years; and their respective fathers lived so before them for twenty. This appears; nor is there any evidence of a time when a union of interest between them existed. On the other hand, no deed of release is produced; nor any witness to prove the fact of division. Under these circumstances, a demand is now made for one. Are they to be considered as divided, or undivided?

Answer.

A separation for fifty years appearing, it must be taken that there has been a partition.

(Signed)

SREENAWASA CHARIAR, *Pandit.*

Remarks.

Catyayana, cited in the Smriti Chandrica, declares that partition of patrimony shall be presumed, where brethren have lived ten years apart, separated in their religious rites and civil observances. The Commentary holds this limitation to be analogous to that of ten years in the case of moveables, and twenty in that of immoveables, ad-

versely possessed. According to the general law, not the lapse of time, but acts indicating separation of interests, are evidence of partition. Mit. on Inh. ch. ii. sect. xii. 3 Dig. p. 407. C.

Through four generations in view, and seven not in view;—through seven generations continues the right of partition. This is the general law. E.

ZILLA OF VERDACHELLUM.

April 13, 1808.

Arnachella Chitty, *v.* Namasevoy Chitty.

If, in default of instrument of discharge, and witnesses to the fact, it be doubtful whether partition have taken place; from what circumstances may it be inferred?

Answer.

If the parties have been in the habit of spending, or borrowing money, without each others' consent;—if they have carried on cultivation separately; or borne separately their respective victualling expenses; if they have done things, whether the others liked it or not; from such tokens partition may be inferred. It may, in like manner, be presumed, from their occupying separate houses and lands; from their making separate gifts and charities during holy days; from their dressing their victuals separately in one and the same house, and worshipping separately the Deity, and Brahmins; or from their becoming witnesses, or securities, &c. one for another; or if one appears to have made a gift to another, or a loan, taking an obligation to repay, or a sale; or if they have kept kine separately; or if they make separate offerings to *Varalatchamee*(1) poojah, &c. All such doings are evidence of partition having taken place.

(Signed) SREENEVASA CHARLOO.

(1) "*Vara Latchemee*"—worship performed by married women to the goddess *Latchemee*, one of the wives of *Vishnu*.

Remarks.

See Mit. on Inh. ch. iii. sect. xii. Also Jimuta Vahana. ch. xiv. and 3 Dig. 407. C.

The judge is not bound, however, to take any, or all of these " tokens" as proof of the fact; he will determine it from a consideration of these and other circumstances, giving such weight to them as in equity they appear to deserve;—this being one of the many points reserved by the Hindu law for equitable judgment. E.

APPENDIX TO CHAP. IX.

ZILLA OF BELLARI.

Santummah, *v.* Tippunnah.

The Plaintiff, in her petition, states that she gave her daughter in marriage to the son of the Defendant; who, using her ill, the girl threw herself into a well, and was drowned: upon which she prays that a sum given by her to her daughter, as a marriage portion, may be returned. The Defendant, in his answer, submits that if the parents of a young woman make her any present on her marriage, it is customary to return it at her death, if she leave no male issue; but that, as the girl in question left a son, the action is not maintainable. The Plaintiff, in her reply, admits that had her daughter died a natural death, it would have been so; the property in question would have vested in her son: but insists that the circumstances of her death make the difference, and that the portion should be restored. You are therefore directed to say, whether, according to the Sastra, the Plaintiff is entitled to recover the sum claimed by her, or not?

Answer.

Vrihaspati and Yajnyawalcya both declare, that any property that has been given to a woman in marriage descends to her issue. The girl in question, *having com-*

mitted some crime in her former state of existence, has been punished in this, by dying a violent death. The property notwithstanding given to her by her mother vests in her son.

(Signed) RUNGA CHARRY, *Pandit.*

Remarks.

There is no colour for pretending that the woman's suicide altered the rule of succession. C.

ZILLA OF CANARA.

Dec. 22, 1809.

Hebangoola Puttiah, an inhabitant of the village of Voopenacandoor, in the district of Hoonadapooram, having been expelled from his caste by his caste people, for adultery with a woman of a low tribe, and being deemed in consequence among them as one dead, his wife and children have come to obtain expiation for themselves.—What is the prescribed expiation, according to *Sastra*.

Answer.

If one be dead in law, in consequence of having committed some vile act, the *Dharma Sastra* prescribes to his wife and sons, for expiation, gifts of cows, in the name of the deceased, according to their ability, with ten thousand repetitions of the *Gayatri;* a thousand and seven *Homahs*, with prayers, and sacrifice to *Narayana;* and, according to circumstances, rice, and *Datchana*, and betel should be served.

Remarks.

" According to a passage cited in the *Nirneya Sindhu*, if a man die expelled from his caste, his heir should perform sixteen *prajapatya;* (penances) but, if he leave no issue, his successor must perform ninety *Cuchhra*, or penances termed severe; (see Menu, ch. xi.) after which, the obsequies of the deceased are to be performed. This

appears then to be an atonement for a deceased sinner; not an expiation for the wife and sons; who do not forfeit caste for his sin, unless they continued to associate with him, in which case the expiation would be different."

C.

"I do not see what a court of justice has to do with any *payaschit*,(1) further than to ascertain that it has been duly performed, when, as in cases similar to this, succession to property, or other civil right, may depend upon it."

E.

(1) *Expiation.*—It forms the subject of the third Canda of every original Hindu law book. See Preface to this work, p.

ZILLA OF BELLARI.

Feb. 6, 1809.

Dacker Bace, *v.* Ulkupah and Jangee.

This action is brought by the Plaintiff, (a female,) on the ground, that the Defendants, disclaiming her as belonging any longer to her caste, had refused to eat with her; and she lays her damages for the injury to her character at thirty rupees. Supposing the charge substantiated, what is to be the consequence, according to the law?

Answer.

If any one of the Plantiff's caste, that have been accustomed to eat with her, refuse without just cause to do so any longer, they are liable to punishment, according to the circumstances of the case.

Remarks.

A passage of Catyayana provides, that if one who ought to associate at meals with another, refuse to do so, without sufficient cause, he shall be fined. C.

Perhaps this was the only mode of bringing the case into the Zillah Court, the regulations not providing for an appeal from a decision of the caste. The answer of the Pandit is right. The Defendants, if guilty of the acts imputed in the plaint, are liable to punishment by the magistrate, not in damages to the individual. The Hindu law knows nothing of discretionary damages. E.

ZILLA OF CHITTORE.

Jan. 5, 1809.

If a Hindu be alleged to have committed an act, for which he is liable to be expelled his caste, how is he to be tried? To whom does it belong to pass sentence upon him? Can his caste eat, or continue their intercourse with him, pending their inquiry?

Answer of the Pandit.

If there be no witness to the conduct imputed, the party must be examined on oath. The examination commences with the priest, the relations of the party, and the caste collectively; and whatever crime they find him to have committed, it is to be referred to the Sastrees; and, upon their being satisfied, the accused is to suffer such penance as they may decree. If he submits and suffers accordingly, he is to be restored to his caste; or rather, he is not to be expelled from it. If he resists, and refuses, the priest, with his relations, should remonstrate, and urge him. If he still persists in his refractoriness, reference should be made to the sovereign, and his funeral rites, with breaking of pots, be solemnized for him, the same as though he were dead; and all intercourse with him discontinued, at the peril of him who, under such circumstances, continues any. If he agrees to submit, a pot of water being put into his hand, he should, without reproach, be directed to offer grass to a cow;—if the

cow grazes on the grass, he is to be received; if otherwise, he must undergo repeated expiation.(1)

Remarks.

"In many of the cases stated in the passages quoted, the persons described are not excluded from society at meals: in others they are expelled from the society of the caste, and none can associate with them at meals, without themselves incurring risk of expulsion." C.

The law referred to is now abrogated; and the Pandit might have saved himself the trouble of quoting it. The words of abrogation are express;—"in the *Caliyuga*, each bears his own sin;" and contamination, therefore, does not follow association with the excommunicated."

As to the principal point, what is generally understood among Europeans by the expression of "turned out of caste," has no legal existence among the Hindus; that is, there cannot be by law at the present day any positive and final rejection from caste, though, no doubt, frequent instances occur, in which the power is arbitrarily usurped by caste assemblies.

The opinion of the Pandit is good, so far as it goes, according to the old law; but it does not answer the whole of the judge's question, "In what manner is it to be tried, and who is to pass judgment?" The Hindu law recognises the jurisdiction of a number of inferior courts, such as *(Cula, Puga, Sreniti)*,—that formed by persons of the

(1) Menu, ch. XI. 182, 183, 184. 187.

same caste,—that by persons of the same trade or profession,—that formed by the various castes, trades, and professions inhabiting a certain district.—The acts of these courts, in cases arising properly under their cognizance, are, in all, as valid as if passed by the King's courts, and may be enforced in like manner; but the law allows an appeal from them all to the King's courts.—It is correctly stated, therefore, that examination should be made by the caste collectively, but that final judgment belongs to the King's court, by which any act of the collective caste may be superseded. An expiation is appointed for every possible offence, for which a man is dismissible from his caste; which, being duly performed, he must be readmitted. E.

ZILLA OF GANJAM.

November, 1805.

Question.

Among the Hindus, can a family woman be degraded by her own caste, on a charge of adultery, sufficiently proved? And, if she can, how far is she readmissible?

Answer.

If adultery be proved against a Hindu woman, she is liable to be degraded, unless the accusation can be traced to malice. With the exception of the tribe of *Charana*, (or dancing women,) it is ordained of Hindu women in general, in all the *Dharma Sastras*, in the chapter entitled *Stree Pundharma*, that the husband should guard the conduct of his wife; and that, on her being convicted of such a crime, she is to be expelled society. The law is applicable alike to Brahmins, Cshatryas, Vaisyas, and Sudras; but not to persons of illegitimate and spurious birth, who are more under the control of custom, and the discretion of their relatives. And, if the relatives of a woman, who has been so convicted, should admit her into the family, they also would be reprehensible. The general customs of the Hindus concur in these respects with the law.

(Signed) C. VARADACHARLOO, *Pandit.*

Remarks.

This opinion is accurate;—and one degraded from class, that is, an outcast, is excluded from inheritance.

S.

ZILLA OF DARAPOORAM.

May 9, 1807.

A married woman having formed a connexion with a stranger, her husband, without any judicial inquiry into her conduct, turned her out of doors; and she never returned to him during his life. He dying without male issue, is she, under these circumstances, entitled to succeed to his estate?

Answer.

If, instead of bringing to a public test, the suspicion he might have reason to entertain of his wife, the husband turns her out of doors, and the matter rests here, her rights remain entire. But she should be provided with proofs of her innocence.

(Signed) SINGARY SANKARA, *Sastree.*

Remarks.

A wife guilty of incontinency is debarred from the right of inheriting from her husband. (Mitacshara on Inh. ch ii. sect. i. § 37.) It cannot be indispensable that the husband should proclaim her dishonour, and his own. In the case, as stated, it appears that he did resent her misconduct; and the passage referred to shews that presumption of guilt suffices for her disinherison. C.

Unless the next heir prove her guilt, she succeeds to the property. Never having returned to her husband's house, what was she doing all the while? She is not to answer the question. This rests with him who claims to supersede her. E.

TRITCHINOPOLY PROVINCIAL COURT.

December 30, 1809.

A widow, with a daughter, but no son by her deceased husband, having taken possession of his estate, is squandering it, being proved to be a bad character.—What says the law in such a case?

Answer.

Though a widow should be proved to be vicious, still, in default of male issue, she has a right to her husband's estate, but not to squander it. It is to be employed in charities, and the maintenance of the family; and, for this purpose, and to preserve the rights of the daughter, trustees and a receiver may be appointed.

(Signed)

TREVALOOR APPENGAR, *Pandit.*

Remarks.

An unchaste woman is excluded from the inheritance of her husband. See Mit. on Inh. ch. ii. sect. i. 30. 37. But no misconduct, other than incontinency, operates disinherison; nor, after the property has vested by inheritance, does she forfeit it, unless for loss of caste, unexpiated by penance, and unredeemed by atonement. The husband's kin are the guardians of the widow; or, in default of *Sapindas* of her husband, the kin of her own father are so. They have power to control her lavish

expenditure, and improvident gifts. Nareda, 2 Dig. 384. See Yajnyawalcya, cited by Jagannatha, Id. 381. C.

The wife does not succeed, unless she be chaste. This is a necessary condition; but in all cases she is entitled to a maintenance. In this case, the daughter, on proof of the unchastity of the mother, would take the estate; and, under the direction of her natural protector, support her mother. In the event of the failure of near kinsmen, the king is her natural protector; and, in this case, a receiver might be appointed; not otherwise.

E.

See 3 Dig. 479; where it is said, that a widow succeeds immediately, on a presumption of her having been chaste, and that she will perform the duties of widowhood; adding, "but afterwards, if her propensities "happen to change, she forfeits the right, which she had "fully possessed."

APPENDIX TO CHAP. X.

ZILLA OF VIZAGAPATAM.

Feb. 1, 1807.

Questions.

1. Is the son bound to discharge a debt contracted by the father?

2. The father having in his lifetime given his son a release, exonerating him from his debts, and living separately from him, is the son still liable notwithstanding?

3. Is the obligation personal, or does it depend on the father having left assets?

Answer.

1. It is incumbent on the son to repay money borrowed by the father for the support, or on account of the necessities of the family.

2. But not in the case of a release as stated; the father having survived, for a length of time, the division of families.

3. The general obligation is independent of assets.

(Signed)

DUSKEE NARRAIN SASTROOLOO, *Pandit.*

Remarks.

1. It is so, if he were a member of the family, having made no partition, nor accepted a separate portion.

2, and 3. Without assets, the son is under a moral and religious, not a civil obligation to pay his father's debts, according to the remark of Sir William Jones, See Jagannatha's Dig. b. i. clxvii. Sir W. Jones's note. This is inferrable from the reason given for the son's liability, which is entirely a religious one. See Nareda, cited by Jagannatha, Dig. b. i. cxciv. A reason of a temporal nature might be supposed in the son's participation in the father's wealth, from the moment of his birth. Being in a sort of family partnership with his father, he might be held liable for debts contracted by the father, as manager of that partnership. This, however, was not in the contemplation of the Hindu legislators; else, the grandson, and great grandson should be held equally liable, if born before the demise of the debtor. But the one is not liable at all; and the other for principal only. Jagannatha's Dig. b. i. cxcvii. It is then a moral obligation only, to pay a debt contracted by the father for his separate account. But one contracted by him for the common concern, binds his sons, &c. who were not previously separated by a partition of effects and debts.

It should however be remarked, that, to exonerate himself from payment of debts, the son must decline the succession to the patrimony. By so doing the burden is left upon the property. See passages in Jagannatha, b. i. clxxi. &c. An insolvent estate being thus aban-

doned to the creditors, is taken by them alone; and no one renders himself liable for debts without assets.

C.

" The Pandit to whom the above questions were re-
" ferred is generally right. The law stated in answer to
" the last of the three seems hard, but it is the law. *Pita*
" *runavar Vatra;*—' a father in debt is an enemy to his
" ' son,' says the Sanscrit proverb." E.

ZILLA OF BELLARI.

July 1, 1807.

Timmanah, *v.* Veneapah.

The Defendant having contracted a debt, which he was unable to pay, it was referred to the Pandit, to say, whether the son was answerable for it in the lifetime of the father, no division of property having taken place between them, and the father insolvent, while the son was able to pay.

Answer.

The son, if he have means, must pay his father's debt. If the son be dead, the grandson is answerable. The responsibility applies to the case of the father's absence in another country, or insolvency, as well as to that of his death.

(Signed)

Remarks.

"See Yajnyawalcya, cited by Jagannatha, Dig. b. i. clxx. &c. with the commentary. It is not expressly said that the debt shall be paid by the son, in the lifetime of his father, who is insolvent. It is declared, however, that he shall pay the debt of the father who is oppressed by calamity, such as incurable disease, &c.

and that, even though no patrimony have come into his hands. But, according to the remark of Sir William Jones, the obligation is moral and religious, not civil." See note on Jagannatha, Dig. b. i. clxvii. C.

ZILLA OF COMBACONUM.

The Defendant, a widow, is sued for a debt contracted by her husband's father, who is dead; her husband being also dead, having left a son, who however is only an infant.—Is the action maintainable against the grandson?

Answer.

Failing the son, the grandson of him who contracted the debt is liable; consequently the infant alluded to, when he comes of age.

Remarks.

" Provided the father's estate be not possessed by an-
" other; (Jagannatha's Dig. b. i. clxxi. &c.) or, if
" there be no assets, provided the grandson were not
" separated from the family partnership:—and, at all
" events, being a minor, he cannot be called upon to pay
" the debt, until he have attained the age of sixteen."
Catyayana, cited by Jagannatha, Dig. b. i. clxxxvii.
" Nor is he liable for interest payable out of his own
" funds." (Id. cxcvii.) C.

ZILLA OF VIZAGAPATAM.

August 24, 1807.

One indebted having died leaving a widow, but no children, is the widow liable for the debt of the deceased generally, or subject only to her possessing assets?

Answer.

If the debt in question arose from money borrowed by the husband for the support, or other indispensable purposes of the family; and if, at the time of his death, he got his wife to agree to repay it, or if the husband's property be sufficient to discharge the debt, and also to supply her with food and clothing, in either of these cases she will be liable; otherwise not.

(Signed)

D. NARRAIN SASTREE, *Pandit.*

Remarks.

A woman is not in general liable for the debts of her husband. See passages quoted in Jagannatha's Dig. b. i. ccvii. &c. But, if she, or any other person, possess assets of the debtor, his debts must be discharged out of such funds; (ibid. ccxx.) and this, whether enough remain for her maintenance, or not.

The case of her undertaking for the debt would be a special one; but it is not so stated in the question.

C.

If a wife, possessing separate property, render it by, special agreement liable for a debt contracted by her husband, she must, in his default, pay it. Or, if she have possessed herself of her husband's property, she is liable to that extent for his debts. A widow is liable in these two cases only. The *Sastri* considers the claim of the widow to subsistence from the husband's estate, as preferable to the claim of his creditors; and, as he is confessedly one, of the most respectable of those, whose names are found in these papers, the presumption is that he is right, though, for this part of his opinion, I know not whence he derives his authority.

E.

ZILLA OF BELLARI.

January 16, 1808.

Erapah, *v.* Ackummah.

Moodapah, paternal nephew to the Defendant's husband deceased, having borrowed money of the Plaintiff, for which he gave him a written promise, died, leaving what property he had in the hands of Defendant, whose husband, together with Moodapah, formed, while living, an undivided family. Is the action maintainable against the Defendant, the widow?

Answer.

It is.

Remarks.

Assets are to be pursued, into whatever hands. See Nareda, cited by Jagannatha, Dig. b. i. clxxii. and innumerable other authorities may be cited, were it requisite in so plain a case. C.

ZILLA OF BELLARI.

April 2, 1808.

Yerrummah, *v.* Sinjevoo.

The Defendant's elder brother, Terumalyah, having failed in an engagement to pay to the Plaintiff, by instalments, the amount of Defendant's bond, the Plaintiff sues the latter upon the original obligation.

The Defendant's answer is, that, upon the Plaintiff importuning him for payment, the debt was transferred, and made payable by his brother Terumalayah; and the sum having been borrowed while Defendant and his brother lived together, the latter has become the debtor, in discharge of the Defendant.

The bond remaining in the possession of the Plaintiff, whether, under these circumstances it be recoverable against the Defendant, is the question.

The Pandit's Answer.

Though the debt was contracted while the brothers lived together, still the bond being the Defendant's, and not appearing to have been adjusted on partition between them, the action is maintainable.

(Signed)

Remarks.

The law directs the debts as well as effects to be divided. Mit. on Inh. ch. i. sect. iii. 1. 9. This, how-

ever, is an adjustment among the parceners, which cannot bar the Plaintiff's remedy against all, or any of the debtors, who were jointly bound; or against his particular debtor, if it were a separate debt. C.

Forbearance, in favour of the Defendant, was a good consideration for the engagement entered into by the elder brother. But that would not discharge the Defendant, unless it appeared to have been the intention of the parties, that he should be released. T. A. S.

ZILLA OF CUDDAPAH.

Feb. 13, 1808.

Gungoo Chitty, *v.* Bauliah and Others.

A father, having made division in his lifetime among his sons by different wives, how, by law, are his *Sraadums*, or ceremonies, to be performed for him after his death?

Answer.

Whether by different mothers, or by the same, under the circumstances stated, all the brothers should meet, and perform together the funeral rites and ceremonies of their deceased father, from his burning till the sixteenth day from his death;—the expense to be borne in common. All future ones are to be performed by each separately.

(Signed)

Remarks.

Correct. C.

ZILLA OF CHINGLEPUT.

July 5, 1808.

Permal, Reddy *v.* Maurepa R. and Tanapah R.

The parties are descended from a common ancestor, the Plaintiff being the grandson, the Defendants the sons of Singapah Reddy;—the Plaintiff's father (Mootapah) by one wife, the Defendants by a different one—having lived together as an undivided family, and the Plaintiff's father being recently dead, a partition is now desired. A schedule of the property accompanying, the 1st Question is, What parts of it are divisible; and what share does the Plaintiff take? 2dly. Is he entitled to a provision for his marriage, independent of his share?

Answer.

Deducting the jewels (1) that have been worn by the Plaintiff, the Defendants, their wives, sons, and daughters, and their respective apparel, the property of the common ancestor Singapah Reddy, should be divided into three shares; of which the Plaintiff will be entitled to one, in right of his father; (2) and the Defendants, in their own right, severally, to the other two. The Plaintiff being a nephew, (3) and not a brother, the expences of his marriage are not chargeable upon the common stock.

(Signed) CRISHNAMA CHARYA.

Remarks.

(1) See Mit. on Inh. ch. i. sect. iv. § 19. (2) See Id. ch. i. sect. v. § 2. (3) See Id. ch. i. sect. vii. § 4. Where the initiatory ceremonies, terminating with marriage, are directed to be performed for brothers, but without any mention of nephews. C.

ZILLA OF SALEM.

January 2, 1808.

Kylapa Counden,

v.

Nallaya Counden, Cooty Counden, and Chingada Counden.

The parties are four brothers, two of whom are unmarried; and there are also belonging to the family two unmarried sisters, and a mother. The property belonging to them being undivided, the Plaintiff sues for a partition. What is the extent of his right?

Answer.

The unmarried brothers and sisters should be first married out of the joint stock. What will remain of the patrimony, with the additions that have been made to it, being divided into six parts, and one of these sub-divided by four, two of the latter should be given to the unmarried girls; and, from the remaining five shares and a half, the expenses requisite for the weddings of the two unmarried brothers, with a portion for the maintenance of the mother, being first deducted, the Plaintiff will be entitled to a fourth of the residue.

(Signed) SINGARA CHARIAR, *Pandit.*

Remarks.

See Mitacshara, ch. i. sect. vii. § 2, 3.

The allotment of a quarter of a share for the nuptials of an unmarried sister, (Ibid. 5, et seq.) is explained by the Chandrica and Madhaveya, as intending only a sufficiency for the charges of her marriage. C.

I do not quite understand the reason of this mode of division, nor the mode itself. If it be meant that, setting off one share for the four brothers, one for the mother, and one for the two sisters, as the measure of their marriage expenses, to be divided between them, it is sufficiently correct. But, what does the Pandit mean by dividing this share into four parts? Provision should be made for the marriage of younger brothers, if the elders are already married, before division;—this part of the opinion is correct. E.

ZILLA OF CHINGLEPUT.

May 21, 1803.

To the Pandit.

The father being dead, leaving a widow, and infant son, with property, the son and estate being in the hands of a brother of the deceased, the widow demands the custody of the one and the other. You will say, who is entitled to it, and whether the son be compellable to live with his mother, or may choose with whom to live.

Answer.

The estate is the son's, out of which the widow of the deceased is only entitled to be maintained. The son is not compellable to live with his mother; it is rather her duty to live with him.

(Signed)

TERORMALY KISTNAMA CHARIAR, *Pandit.*

Remark.

The sovereign is the guardian of minors. (3 Digest. 542.) The mother cannot claim a share, but a maintenance merely, from an only son; her right to a specific allotment arising only when a partition is made. C.

ZILLA OF NELLORE.

By the Pandit.

If there be undivided brothers, and one die, leaving a widow and a son, they succeed to his share of the joint property.

Remarks.

(Mr. Colebrooke's remark upon this missing.)

As long as the family continues undivided, all the parceners, their wives, and families, are entitled to a joint maintenance: on division, widows, wives, and children can claim only on the portion of their respective husbands and fathers. In the present case, if the son were alive at the time of division, his mother would have to look to him alone for maintenance: if he were dead, she could be entitled, in right at once both of her husband and son, to succeed to a full share of the estate; that is to say, a full share should be the *maximum* allowed her. If litigation take place, it is the measure to be adopted by the Court; not that the dividing parties are bound to give her so much, if they can prevail on her to take less; nor any share at all, if they can provide among themselves for her maintenance. Such at least I conceive to be the correct doctrine; whether her dominion over the property be limited, or otherwise, is another question.

E.

ZILLA OF CUDDAPAH.

Bussarummah, *v.* Veerapah.

The question here is between a mother and her sons, as to the mother's rights.

The Plaintiff Bussarummah's husband died forty years ago, having amassed in his life, and left an estate, in ready money and jewels, to the amount of about 5000 pagodas. Upon his death, she took possession of his property, delivering it over, as she alleges, to her four sons on their coming of age. Of this there is no evidence, and it is denied by her son, the Defendant. She further represents that, about fifteen years ago, she went to Jingalapillay to demand her share, sitting down for the purpose at the house of the Defendant, and that at that time the matter was accommodated by an agreement in writing, purporting that she was to have one share, the estate being divided into five. Two witnesses for the Plaintiff declare that, while she was sitting at her son's house, to enforce her claim, a written settlement took place, but that from the length of time since, they could give no account of its contents. Another stated that he, at the request of her son Mullanah, went and invited her to a wedding; to which she refusing to go, he signed a paper, promising to obtain for her 300 pagodas; upon which she attended: that after it was over, and the guests gone, she reminded him of his promise, upon which he wrote to the Defendant

to pay the 300 pagodas according to agreement, and gave the letter to her to carry; but that whether the money was paid, or not, he could not say. The Plaintiff moreover represented that the Defendant had ordered her to be put upon a cot, and thrown into the woods; in proof of which she called four witnesses, who testified that the Defendant had put his mother on a cot, and sent her to a village about a quarter of a mile distant from his house; but denied the order for her being thrown into the woods. The Defendant stated that the 300 pagodas had been paid by his younger brother, and that the Plaintiff, having the option, had refused to live in their house. Under this uncertainty of the evidence, what shou d the sons be deemed to give the mother, according to Dharma Sastra?

Answer of the Sastree.

(Slokums in Sanscrit.)

According to these Ditta of Gautama Smriti, &c. women have no right to Daya Bhaga, or shares of a family estate. But they stand opposed by others.

(Slokum of Yajnyawalcya,
Slokum of Catyayanah,
Slokum of Vyasa).

According to these, the mother shares equally with the sons, whether the division take place in the time of the father, or afterwards in that of the sons. The mistake lies in qualifying her right to participate, as a right to share.

(Another Slokum.)

According to this, she is entitled to as much only as will enable her to give rice with alms to poor strangers, and for her food and raiment. Thus the expression of an equal share with the sons resolves itself into a particular portion of money in the division of the estate by the sons; not that she takes an equal proportion with them. It is so held by Jagannatha-turca-punchanana; who declares that the son is bound to provide his mother with maintenance only, and no more. In the present case, though the wealth of the Defendant be considerable, he is bound to allow his mother for food and raiment only, and he is under no further obligation.

(Signed)

Remarks.

This opinion is conformable to the doctrine of the Smriti Chandrica, where it is affirmed, on the authority of a passage of Baudhayana, (in which a text of the Taittinyaca veda is cited, declaring women incapable of inheritance,) that the mother shall not take a share as of heritage, but an allotment adequate to her wants, and not exceeding in the whole the amount of a son's share, including what she may possess, as her peculiar property. This position is however contravened in the *Madhaveya*, a work understood to be of great authority in the South of India, and which seems, in this instance, entitled to a preference over the Smriti Chandrica. The reference to Jagannatha's Digest does not appear to be correct. It is

there maintained (see Translation, vol. iii. p. 12, and 30.) that the mother may exact from her sons, making a partition, an equal share with them; and that it is only through maternal tenderness that this right is in present times foregone. C.

The widow's title is to maintenance; the ultimate measure of which is, according to all the authorities, a share. E.

ZILLA OF VIZAGAPATAM.

Jan. 23, 1810.

Two brothers, of the Cshatrya tribe, being about to divide, after his death, the estate of their father, the question is, as to the rights of the mother, who claims to share with them. They contend that she is entitled only to a maintenance. To what, in this tribe, is she entitled?

Answer.

The mother has by law no right to share with her sons. She is entitled to her *Stridhana,* and, if there be land yielding an annual produce, to as much of it as will suffice, to be settled upon her for a maintenance.

(Signed) DUSKY NARRAIN, *Sastree.*

Remarks.

The law provides, that when partition takes place among brothers, the mother shall have an allotment made up to her, equal to a full share. There is no distinction in this respect among the different tribes. C.

ZILLA OF DARAPOORAM.

February 19, 1807.

Vencatamah,

v.

Trevengada Chary, and Ragoonada Chary.

The Plaintiff is a childless widow. The Defendants are the half brothers, by the same father, to her deceased husband. What are her rights, as against the Defendants?

Answer.

She is entitled to demand of them as much as will provide her in food and raiment, with sufficient for the *Sraadum*, or annual ceremony of her husband.

Remarks.

They are bound to maintain her. See Nareda, cited in Mitacsh. on Inh. ch. ii. sect. i. § 7.

This is *not* the law of the *Smritis*. It is the convenient law of more modern commentators, endeavoured to be supported by proposing alterations in the original texts, for which there is no foundation. In recent times, however, when the operation of the Hindu law had been interrupted, and none other established in its stead, the nefarious practice of the males of the family seizing all the property of it, and reducing the females to a state

little short of slavery, came gradually to prevail; which practice, as appears throughout these papers, the present race of Pandits are sufficiently inclined to support.(1)

The correct doctrine is, that a widow succeeds to the "entire share" (*critsnam ansam*) of her husband immediately, if partition have taken place; eventually, if it have not. What then is the situation of a widow of a coparcener during the time the family continue undivided? Is she merely entitled to a maintenance? No—she is in the situation of her deceased husband; and is entitled to the use of the joint property, to the full extent that he was entitled to it, remembering always that, as a female, she is under the *protection* of her natural guardians.

(2) "*Cristnam ansam*," the entire *share*. This expression is read by some *critsnam artham*, the "entire "*estate*;" and, on this reading, it is maintained that the widow takes the estate of her deceased husband, in the event only of previous partition. But this is confuted by the better jurists. E.

(1) To this purpose, see, printed at Calcutta, in 1823, "Brief Remarks, regarding modern Encroachments on the ancient Rights of Females, according to the Hindu Law of Inheritance; by Rammohun Roy."

(2) See Jim. Vah. ch. XI. sect. i. 7. note.

Extract from a Note of the case of Exparte Janaky Ummah, in the Supreme Court of Madras, 1814: *communicated by Sir John Anstruther, Ch. J.—See Notes of Cases at Madras*, vol. ii. p. 287.

THE Master, by his report, dated the 12th of May, 1815, (reciting the order of reference,) having ascertained the relation of the parties; that Janaky Ummah, the Petitioner, had, subsequent to the death of her husband, in October 1810, been maintained by her step-son Ramasamy, deceased; that Coopamah, the widow of Ramasamy, had succeeded to his property, amounting to about pagodas, and that the Petitioner had no property to signify of her own; reported five pagodas monthly to be, in his opinion, a reasonable sum to be allowed her out of the estate of Ramasamy, to commence from the 7th of October, 1810, the period of his death, and to continue during her life, together with a house valued at three hundred pagodas. The Master stated, that, in settling the amount to be allowed, he had, pursuant to the order of reference, examined for the purpose respectable heads of families; and he concluded by expressing his opinion, that the house, with the allowance proposed, were sufficient and suitable for the maintenance (including every necessary provision) of the Petitioner and her dependants, whom he found to be her daughter, a a Brahmin to offer supplications, and a servant.

"The order of reference was, I think, defective, in not "directing the Master to provide for the payment of the "allowance to be made, either by assigning a sufficient "sum in trust for the purpose, or by obtaining some other "adequate security. There are, I believe, three modes "in practice. One is, to estimate the value of the main- "tenance to be allowed, and to give the widow a sum. "Another is, to invest a sum in trust for the payment of "it. A third, to assign a portion of land for the purpose "revertible to the estate, after the death of the widow. "Sometimes Company's paper is deposited, the interest "of which is equal to the allowance. This must be the "most beneficial provision for the widow."

Subjoined to the above note is the following answer to an inquiry on the subject, addressed to Sir John Anstruther. The answer was dated Calcutta, May 16, 1804.

"At first, a good deal of difficulty was experienced by "always referring to Brahmins. All agree that mainte- "nance must bear some degree of relation to the amount "of the property. The Brahmins, who are universally the "directors of all widows, and especially of the rich ones, "when the question was referred to them, stating the "amount of the property, and the situation, invariably "represented a large allowance as necessary for the "widow, and especially for religious purposes. Misled "by these reports, the allowances were large. The "people, however, represented against this, and truly, that

" the state of widowhood, by the Hindu religion was, as " it really is, a state of degradation and penance, with " which large allowances were inconsistent: that they " had the effect of throwing widows into the hands of de- " signing men, who enticed them from their families, " from whom they lived apart, to the disgrace of both;— " that many of the supposed religious ceremonies were " either performed by the family, and not by the widow, " or, if performed by her, were properly performed at a " small expense. Finding these representations to be " true, the course since pursued has been, to take the " sum usually allowed by respectable families, in the same " situation, who live well with their mother and relations. " With us, the Master frames his report on their examina- " tions. By this means they have been much reduced, and " are now low, although they still bear some relation to " the amount of the estate;—but an evil of a very serious " tendency has been entirely stopped. The mode of " securing it is various. Sometimes we set apart a sum " in the Accountant General's hands; sometimes we take " security. The country Courts do the same. I shall " send you Mr. Blaquiere's opinion in a few days. I " have desired him, with his Pandits, to go more at large " into the question, with the authorities, than I could."

Opinion of Mr. Blaquiere, as subsequently communicated to Sir John Anstruther.

" The amount allowed for the maintenance of a widow " should be in proportion to her wants, that is, sufficient

" for her own support, and that of those immediately de-
" pendant on her. The means of the estate must be con-
" sidered, and the general circumstances of the particular
" case the guide for settling the amount of the main-
" tenance, there being no fixed rate or proportion laid
" down."

ZILLA OF SALEM.

Gooruvummall, *v.* Vidy Jyer.

The humble address of the eight arbitrators, viz. Salem Jeggy Sastry, Alagary Jyenger, Camara pollum Rungyen, Samien, Coonatver Sheshien, Vellore Vangadattan, Codimadi Soobien, and Paupien.

Whereas, according to the order of the Court, we, the eight persons above named, having maturely deliberated upon the differences between the Plaintiff Yalapoor Gooruvummall, and the Defendant Vidy Jyen of this place, about the maintenance claimed by her; and having sent for the said Gooruvummall, and the said Vidy Jyen, heard their declarations, and considered their circumstances; we award, as to the subsistence that Vidy Jyen should continue to furnish to the Plaintiff Gooruvummall, as follows: viz. He must allow her for paddy, including contingent expenses for her victuals during her life, at the rate of three rupees per month, amounting to thirty-six rupees a year.—For one annual Sraadum for her husband, and another for her son-in-law, at the rate of five rupees for each, making ten rupees.—Four rupees for a cloth; and, as she has two daughters, at the rate of one-fourth of a rupee for turmerick and cooncomum for them; total annual amount, fifty rupees and one-fourth, which ought to be paid her every month at the rate of four rupees, and three-sixteenths, per month. In whatever month it be not paid, she will be deprived of her livelihood for that month: therefore it should be paid in ready-money every

month. With regard to her residence, a portion of the family house toward the west should be set apart, and assigned her. The Defendant Vidy Jyen ought to attend with her, and perform the annual *Sraadum* for her husband. This appearing to be just and equitable, we have awarded accordingly.

By direction of the Arbitrators,

(Signed) VELLORE ANUNTA CHARY.

The award of the Arbitrators in favour of Gooruvummal being proper, I approve of it.

(Signed) T. SINGARA CHARY.

Remarks.

What relation the Defendant is to the Plaintiff's deceased husband does not appear:—it is to be presumed a brother, nephew, or cousin, with whom he lived as member of an undivided family. In which case, the Plaintiff's right of maintenance is conformable to the passage of Nareda, in the Mit. or Inh. ch. ii. sect. i. 7. C.

ZILLA OF NELLORE.

If a man die leaving a widow and two sons, she and they are to take possession of the estate; but if she have any *Stridhana*, she is entitled only to a half share; otherwise, she shares equally with her sons. If the sons are minors, and the person appointed to be their guardian embezzle the property, the widow, with their concurrence, may authorize her father to take the management out of his hands.

Remarks.

(Referring, as to the widow's right of sharing, to former "remarks" on the same point.) If the guardian abuse his trust, no doubt, he should be removed. It is the duty of the sovereign to provide for the care of the property of minors. (3 Dig. 542.) The law has not assigned any power to the mother in this respect.

C.

The widow is entitled to a maintenance, the measure of which is an equal share of the estate with the rest of the coparceners. If she have property of her own, not consisting merely in jewels, clothes, ornaments, and the like, but from which an income is derivable, in this case, it is to be made up equal to a share, without reference to any fanciful division of halves or quarters, of which the Pandits (mistaking the explanatory language of the law, as "she shall otherwise receive a half or a quarter" for

positive injunction) are so fond. I say above "from "which an income is derivable." I cannot just now refer to my authority for this, as I have not my books at hand; but it is the sense of the law. The law says she shall have a maintenance; but it is not required that either the family stock, or her own, shall be reduced to afford it. It is clearly meant, that it shall be a maintenance by income: if therefore she have no property, from which she can derive income without destroying the property, she is still entitled to a full share. E.

ZILLA OF NELLORE.

By the Pandit.

On the death of a Brahmin, leaving a widow and two sons, she and they take possession of his estate, subject to her possession of *Stridhana*, in which case she is entitled only to a half share.

Remarks.

This is taken from the Mitacshara, on Inh. ch. i. sect. vii. 2. The Chandrica explains that her allotment, including her separate property, must be made equal to a full share. C.

This opinion is generally correct, but I do not understand either the authority or the reason for restricting the maintenance to the amount of half a share, in case of the existence of *Stridhana*. The division (as it appears to me) *should be made without reference to any property she may hold under this title*, unless it may have been accepted by her, with consent of the parties concerned, in lieu of other claims; and in this case it is evident she is entitled to no further share in the event of division. The widow's claim to maintenance from her husband's estate is absolute, unlimited by circumstances; but then it is only a claim to maintenance, and it is not correct to say, that she is entitled to any share or division. This makes no alteration in her right, it is still maintenance only to

which she is entitled; but to this some legal measure must be assigned, and the correct opinion seems to be, that it shall be the amount of a full share as received by the coparceners, or perhaps this may be considered as its *maximum*. This is of course applicable only where there are male heirs, the widow succeeding by right to the property on failure of such. E.

ZILLA OF VERDACHELLUM.

January 4, 1808.

Vencummy, *v.* Govindoo Chitty, and two Others.

The Plaintiff's husband, deceased, and the Defendants were undivided brothers. The deceased having left a son by the Plaintiff, aged four years, she demands a share out of the common estate for herself, and another for her child. To her claim as regards herself, is opposed, 1. The general law of inheritance and partition. 2. Her conduct, to which adultery is imputed. Under these circumstances, what are her rights?

Answer.

There is no ground for the claim of separate shares for herself and her son. The share that is given to the son must maintain his mother. Though she should not conduct herself to the entire satisfaction of her caste people, still she must be subsisted out of the share allotted to her son, who in the mean time, is to continue under her care till he attain his age; nor though she should prove an adulteress, can he refuse to supply her with the necessaries of life.

Remarks.

The son is entitled to the share of his father, who was one of four brothers, (Mit. or Inh. ch. i. sect. v. 2.) and his mother must be maintained out of his allotment: but

the sovereign, or a person selected by his authority, is the guardian of the widow. Brethren are not bound to maintain the unchaste widow of their childless brothers; (Mit. or Inh. ch. ii. sect. i. 7.) nor has any authority been found for imposing it as a civil obligation on the son to maintain his mother, if she be an adulteress.

C.

Correct, as to the exclusive right and consequent obligation of the son. I do not think, however, and probably the Pandit does not intend, that the Defendants could be compelled to a division of the estate, until the majority of the child.

E.

ZILLA OF CHINGLEPUT.

April 23, 1805.

One Ragava Moodely left five sons, of whom three dying without issue, the remaining two left, the one a son, the other a son and a widowed daughter.—How is the estate to be divided?

Answer.

It is to be divided between the two cousins. As to the widow, whatever her father gave her in his lifetime, with whatever she got from her father-in-law, the whole is hers. The parties should perform the ceremonies (*Sraadhum*) for those who died without issue.

(Signed) T. KISTNAMA CHARIAR.

Remarks.

The law gives nothing to a married daughter, where male issue is left. The claim of an unmarried daughter only is noticed. Mitacsh. on Inh. ch. i. sect. vii. § 14.

C.

ZILLA OF CHINGLEPUT.

April 11, 1805.

Viziaragavyengar, *v.* Pommalyengar, Achalyengar, and Others.

The Plaintiff is a son, and the Defendants the brothers of Vurdyengar, deceased; who, together with the Defendants, were the sons of a person of the same name with the Plaintiff; viz. Viziaragavyengar. Viziaragavyengar, the grandfather of the Plaintiff, had two brothers, one of whom adopted his nephew the Defendant Pommalyengar, the other his nephew Achalyengar, another of the Defendants. The Plaintiff has three younger brothers and two unmarried sisters: there never has been any division of property in the family, and the augmentations to it, by the individual members, have been unequal. The Plaintiff claiming a partition, how is it to be made in this case?

Answer.

Unequal gains, by the respective members of an undivided family, using for the purpose the family property, make no difference upon partition. It must still be equal.

The grandfather having had two brothers, the property in question should be divided into three parts. The adopted representatives of the two brothers will take their respective shares. The remaining share will be divisible between the Plaintiff, as the son, and the remaining Defendants as the brothers of Vurdyengar; who, together represent Viziaragavyengar, the Plaintiff's grandfather.

The share of Vurdyengar, the father of the Plaintiff, must be divided between the Plaintiff and his younger brothers, who, together with the Plaintiff, are chargeable with the marriage expenses of their sisters, and with their maintenance till marriage.

(Signed) T. KISTNAMACHARIAR, *Pandit.*

Remarks.

Vijnyaneswara allots to an unmarried sister a quarter of a share. (Mitacsh. on Inh. ch. i. sect. vii. § 5, et seq.) But the Chandrica and Madhavya countenance the opinion, that the specified allotment intends only a sufficiency for the charges of the sister's nuptials; and their authority has been very rightly followed in the one here delivered.

For the authority of the first part of this answer, concerning equal partition, notwithstanding inequality of gains, see Mitacshara on Inh. ch. i. sect. iv. § 31.

C.

This is a peculiar case; and though the mode of division indicated by the Pandit may be liable to doubt, I think it, under the circumstances of the case, correct. Making the division among the ancestors of the parties, instead of the parties themselves, is faulty, wherever it can be avoided. But it must sometimes be done; in this case it is necessary, from the circumstance of the adoption of two of the uncles of the Plaintiff by his grand-uncles; for, had the division been made between the uncles and nephews, as in common cases, these two could not take

as brothers of Vurdyengar, of which character they were deprived by the act of adoption. In order, therefore, to bring them in, it was necessary to ascend a degree higher in the genealogical scale, and to make the first division between their natural and adoptive fathers, to whose respective shares they succeed. E.

APPENDIX TO CHAP. XI.

BOMBAY.

Court of Adawlut, at Broach.

April 4, 1810.

On the death of a man belonging to a caste, in which *Natras* are permitted, if the age of his widow exceed not fifteen years, her parents possess the right of making the *Natra*. If she be more than fifteen, she is independent in this respect, and not under their controul; but their consent ought nevertheless to be obtained. The husband must have been dead a year, before the *Natra* can take place. Should it be made within the year, the woman must not wear matrimonial ornaments, nor go to her new husband's house till the expiration of this period. Gandharva Vivaha, or *Natras*, are permitted in the Mitacshara.

(Signed)

NARBHUYARAM, *Sastree.*

WABUTHRAM, *Sastree.*

Remarks.

Gandharva marriages are briefly noticed in the Mitachara, but no remarks have been found which identify them with *Natras*, or support the positions contained in his law opinion. C.

BOMBAY.

Broach, Court of Recorder.

On the death of a woman's *Vivaha Swami*, (first husband,) having neither son nor daughter, where it is allowed by the usage of her caste to marry again, the first marriage being called Vivaha, a subsequent one is termed *Gandharva Vivaha*, (1) and commonly called on this side of India, *Natra;* such second marriages being allowed only in the lowest castes, and in these with an exception of a son of her deceased husband by another woman, or of his nephew. Before a woman contracts one, she must restore the ornaments and apparel she received from her first husband to his heirs.

(Signed) NARBHUYARAM, *Sastree.*
WABUTHRAM, *Sastree.*

Remarks.

Such second marriages are also practised among the lower tribes in Hindustan proper, and the East of India; and called in Hindustan, *Saghac.* Second marriages even of virgin widows being forbidden in the *Caliuga*, (See passages cited in the general note to the translation of Menu, i. and vi.) no such practice prevails among the superior castes. The refund directed by the Pandit is customary. C.

(1) See Menu, ch. III. v. 32.

ZILLA OF VIZAGAPATAM.

March 22, 1810.

1. In the case of a widow, entitled to maintenance only, does it depend upon her remaining in the house of her deceased husband; or is she at liberty, without prejudice, to reside in her father's?

2. How is she to be provided for?

Answer.

A widow, residing occasionally with her parents, according to the custom of the country, should remain in general in the house of her husband, in which she is entitled to be provided with a suitable allowance. Either a yearly sum in ready money may be given her, or a portion of land that will yield one; or there may be a composition with her as can be agreed.

Remarks.

She does not lose her right of maintenance by visiting her own relations; but a widow is not entirely her own mistress, being subject to the control of her husband's family, who might require her to return to live in her husband's house. C.

ZILLA OF VIZAGAPATAM.

Questions.

1. May a widow, on the marriage of her daughter, make over her property to such daughter and her son-in-law?

2. May she assign to an elder sister, having a married daughter living?

3. Should both Sunnuds above alluded to, be liable to be considered void, which has the preferable right as heir to the widow, her daughter's husband, or her elder sister?

Answer.

1. Any thing that is hers, she has a right to transfer.

2. The daughter being nearer akin to her than the sister, she cannot assign to the latter, in exclusion of the former.

3. The daughter's husband.

(Signed) DUSKY NARRAIN, *Sastraloo.*

Remarks.

1. No doubt the widow may give away her own property, excepting land given to her by her husband, or inherited from him; which she cannot dispose of, without consent of the next heirs.,

2. This would amount to a restriction from giving, and is at variance with the answer to the preceding question. The approbation of her proper guardian may however be requisite.

3. The daughter's husband is heir, preferably to the sister; but would be postponed if the latter had a son; the sister's son being first heir after the husband, in the case of a woman's separate property.—See in Jagannatha, b. 5. v. ccccxiii; a passage which is cited in Smriti-Chandrica, Madhavya, and other compilations. C.

BOMBAY.

Of two widows, the elder one has two sons by the deceased husband, the other a daughter. The latter having received her share of the deceased's property, and dying, in whom does her share vest; in her daughter, or in the sons of the surviving widow?

Answer.—Caret.

Remarks.

The share allotted as a provision to the widow (Mit. on Inh. ch. i. sect. vii. § 2.) does not pass to the heirs of her peculiar property, (*Stridhana*,) but to her husband's heirs. This point, however, may involve some difficulty, according to the opinion of those who hold, that it is a mere allotment for maintenance, not participation as heir. With regard to the daughter, she, as a sister, is entitled to the fourth of a brother's share, for her marriage. Mit. on Inh. ch. i. sect. vii. 6. C.

A reasonable doubt may exist, how the distribution of the property should be made in this case. It is certain, I think, that the law does not intend that the share of the widow should belong to her in absolute dominion; and it does not descend to hers, but to the husband's heirs. In this view of it, the sons of the surviving widow succeed to her share. But the daughter is the heir of the father, as well as the sons. And there is a strong text, fre-

quently quoted and insisted upon by jurists, ordaining, that "sons shall succeed to the father, and daughters to "the mother." The difference exists, however, in the mode, rather than in the fact; for if she succeeds to the brother's share, she gets, in the present instance, a third;—if she takes by subduction from all the shares, a fourth. E.

My idea is, that the portion of the husband's estate, to which the widow (with a daughter) succeeded, was still substantially the husband's estate, passing to his heirs, after the death of the widow, who had only a life interest in it. D. (1)

I agree to this, and I think that, under the circumstances of the case, the two sons, according to the doctrine of the Mitacshara, which is most favourable to the claims of daughters, would be solely entitled to the property received as maintenance from their father's estate by the rival wife of their mother. According to the Mitacshara, (at least so I understand it,) on the death of the father, his estate would be divided into eighty parts; of which, in the course of inheritance, each of the sons would immediately take nineteen, and the unmarried daughter, to effect her marriage, four; being exactly one quarter of what would be her allotment were she male. The daughter's marriage being thus provided for, it appears to me that the portions

(1) William Dorin, Esq. one of the Judges of the Sudder Dewanny Adawlut, of Bengal.

of the two widows, on their respective deaths, would revert to the heirs at law of the husband, viz. his sons. It must be confessed this case presents difficulties, and I speak with much diffidence on the subject. S.

BROACH.

Court of Adawlut.

The widow of a man of the goldsmith caste, having made a will, by which she disposed of her property to a stranger, to the prejudice of her daughter, who neither subscribed nor consented to it, it is void by the Dharma Sastra; and the person in whose favour it was, having been at the expense of her funeral, the amount should be reimbursed out of the estate, and the residue made over to the daughter.

By the Pandit.

Remarks.

A woman may dispose of her own peculiar property, (*Stridhana,*) but what comes to her from her husband, she can only give away with the sanction of his kin; with whom the controul of her conduct rests. Without such sanction, even the consent of the daughter, as next presumptive heir, would hardly suffice.

It is equitable that the funeral expenses should be reimbursed. For the person who takes the succession is bound to defray the obsequies. 3. Dig. p. 545. C.

ZILLA OF VIZAGAPATAM.

November 19, 1805.

A. Ramasamy, *v.* Mandavilly Pariah.

A childless widow having succeeded to the separate property of her husband, who has brothers living, to what extent has she power to aliene it, and how?

Answer.—Caret.

Remarks.

A widow who succeeds to her husband's estate, is restricted from aliening the *immoveables*, without consent of his heirs, according to the Madhavya; but there does not appear to be any restriction on her power, as affecting *moveables.* C.

The property of a widow in her husband's estate is not absolute. *Na stri swa fantryar harite.* "No wo-"man, under any circumstances, is absolutely inde-"pendent." A woman has a right to use the property to a certain extent in charity, though, no doubt, the Court would restrain *waste*, even on this account. E.

MASULIPATAM, PROVINCIAL COURT.

Mahedara Ramiah and Cuvaly Veneanah, *Appellants;*
Oopudrasta Mallayah, - - - *Respondent.*

To the Pandit.

Atchana Dulchataloo, and Pandita Royaloo, were brothers by the same mother; and Pandita Royaloo having acquired some *agraharum* lands, divided them into eighteen portions, of which he gave twelve to Brahmins, reserving the remaining ones for his own use. Some time after he died, without male issue, and his wife ascended the funeral pile with him, having previously divided the portion reserved by her husband, as follows, viz.: one share to the respondent Mallayah, the son of Atchana, the brother of her husband; one share to each of her husband's sister's sons, namely, Venkiah and Ramiah, the Appellants, and the remainder to Brahmins. It appears that Atchana and Pandita, the brothers, having divided the property previous to the death of Pandita, the wife of Pandita objected to the performance of her funeral obsequies by the Respondent Mallayah, on the ground (not proved) of his father having been degraded by his caste; and, at her desire, her husband's sister's sons, the Appellants, performed her funeral obsequies. You will state, for the information of the Court, how far the widow of Pandita had a right, by the Hindu law, so to dispose of the land left by her husband; or whether it becomes the property of his nephew, the Respondent?

Answer of the Pandit.

I am of opinion that the wife of Pandita Royaloo had sufficient authority to give away the land left by her husband, and that Mallayah, the Respondent, has no right to oppose the gift, his father not having objected, when Pandita divided away and distributed, at his pleasure, some parts, reserving to himself the residue of what he had acquired.

(Signed) V. NARSIMMA, *Sastree.*
May 13, 1805.

Remarks.

It is maintained in the Madhavya, that no widow can give away immoveable property, coming to her from her husband, without consent of the next heirs. This seems to be the correct doctrine. Pandita had doubtless power to give away his lands; but what he did not give away, may, and should, pass regularly in succession. C.

The widow had no right to make the gift in question. She had a right to use the property for charitable purposes; but the law limits even these to what may be consistent with her circumstances and condition in life.

E.

ZILLA OF VIZAGAPATAM.

April 9, 1811.

A Brahmin woman dying without children, an undivided brother of her husband claimed the ornaments given her on her marriage, as against her father, who insisted upon his right to them. Upon reference,

The Pandit reported it as his opinion, that, among the three lower castes, the *Stridhana* of a woman, dying without children, or grand-children, belongs to the relations of her husband, unless married in the form of *Asura*, in which case her own parents would be entitled to it. In the case referred, he certified that the ornaments in question vested in her husband's brother.

Remarks.

This agrees with the Mitacsh. on Inh. ch. ii. sect. xi.

C.

The descent of women's property is in all cases governed by the form of marriage. There are eight different forms, and if the rite be celebrated according to any of the four approved ones, (the *Brahme* and the rest,) the property goes to the husband, and husband's relations: if according to one of the disapproved ones, (the *Asura* and the rest,) it goes to her own, commencing with her parents. In either case, females are preferred to males, with the exception of the husband in the first instance; at least so I understand the law, according to the school in which I have studied it.

E.

ZILLA OF COMBACONUM.

August 13, 1807.

Anuntaramiar, *v.* Vencata Narrain.

The Plaintiff, on the death of his daughter-in-law, seeks to recover the jewels which she wore, partly given her by him, partly by her father, the Defendant. The Defendant resists the action, on the ground of his having maintained her for six years subsequent to the death of her husband; in the course of which he parted with them for her support.—*Qu.* If the Plaintiff be entitled to recover?

Answers.

The Plaintiff is entitled. Had the Defendant's maintenance of his daughter been at the instance of the Plaintiff, it might be otherwise.

Remarks.

The husband's nearest kinsman is heir to a woman's separate property. Mitachsh. on Inh. ch. ii. sect. xi. 11. The Plaintiff would have been liable for the reasonable charges of his daughter-in-law's maintenance, had he refused or neglected to support her. C.

I conclude that, on the death of the daughter-in-law, the heir to her jewels, as woman's peculiar property, would be her husband, if living. He being dead, it

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seems to rest between her husband's father and her own parents; the former succeeding, if the marriage were according to one of the four first forms noticed in the Mitacshara, ch. ii. sect. xi. 11; if otherwise, the latter.

D. (1)

(1) William Dorin, Esq one of the Judges of the Sudder Dewanny Adawlut, of Bengal.

SUMMARY,

Extracted from p. 100 *of the Daya Bhaga of Jimuta Vahana.*

The settled order of succession to the separate property of a woman is as follows:—

In the case of property left by a maiden, the right devolves first on the uterine brother; or, if there be none, on the mother; but if she be dead, on the father.

It is the same in respect to property left by a betrothed damsel, excepting what was given by the bridegroom: for he has a right to whatever he gave.

In regard to the property of a married woman, which was received at her marriage, her maiden daughter has the first claim, and next a betrothed one: but, on failure of both these, her married daughters who have, or are likely to have male issue, inherit together; or, on failure of either of them, the other takes the succession. If there be none of either description, the barren and the widowed daughters have an equal right; and, on failure of one, the other succeeds. Next, the right devolves in order on the son, the daughter's son, the son's son, the great grandson in the male line, the son of a contemporary wife, her grandson, and her great-grandson in the male line;—with this difference, that, according to Jimuta Vahana, the right of the daughter's son follows that of the contemporary wife's son.

In the next place, if the property were received at the

time of nuptials, celebrated in one of the five forms denominated *Brahma*, &c. the order of successors is husband, brother, mother, and father. But, if it were received at nuptials in one of the three forms called *Asura*, &c., the order is mother, father, brother, and husband.

Then the husband's younger brother; after him, the son of the husband's younger brother, and the son of his elder brother; next, the sister's son; afterwards, the husband's sister's son; then the brother's son; after him, the son-in-law; next, the father-in-law; subsequently, the elder brother-in-law. In the next place, kinsmen allied by funeral oblations (*sapindas*), in the order of proximity; after them, kinsmen connected by family (*saculyas*); and, lastly, such as are allied by similar oblations of water (*samonadacas*).

In the case of property given by the father, at any other time but the wedding, a maiden daughter succeeds in the first instance; next a son; then a daughter who has, and one who is likely to have, male issue; after them, the daughter's son, the son's son, the great-grandson in the male line, the son of a contemporary wife, and her grandson and great-grandson in the male line; next to these, the barren and widowed daughters inherit together; afterwards, the succession proceeds as before described, in the case of property received at nuptials, denominated *Brahma*, &c.

But, in the instance of property not received at a wedding, and other than such as is given by the father, the son and unmarried daughter inherit together; or, on failure of both of them, the daughters who have, or may

have, male issue; and afterwards the son's son, the daughter's son, the great grandson in the male line, the son of the contemporary wife, her grandson, and great grandson in the male line, are rightful claimants in succession. Next to these, the barren and widowed daughters inherit together; and, lastly, the order is, as before, the same with that of property received at Brahma nuptials.

SRICRISHNA.

APPENDIX TO CHAP. XII.

ZILLA OF BELLARI.

August 18, 1807.

Ch. Veerapah and Others, *v.* Goodummah.

To the Pandit.

It is referred to you to say, whether Verapah was capable of declaring to his wife, with effect, at the time of his death, that his daughter Goodummah should be heir to his property?

Answer.

Provided no distribution of property have been previously made by a man in his family, he may bequeath it as he pleases, land excepted.

Remarks.

This is no answer to the question put. The question is, whether the husband could competently declare that the daughter should succeed to the wife's property?—Certainly; the husband cannot so dispose of the wife's property; beside which, the declaration in the case was useless, as the law gives the mother's property to the daughter. A father cannot "bequeath as he pleases." He may distribute his property, but he must do it according to law; and if the distribution be otherwise made, it

may be set aside, on the complaint of any party concerned. How can the father in such a case be said to bequeath? I should like to know how this, and similar terms, are expressed in the original of this paper. It would puzzle any one to translate them into any of the Indian-languages, with which I am acquainted. E.

MADRAS, SUDDER DEWANNY ADAWLUT.

Questions.

1. Can a Hindu dispose of his property by will?

2. Can a Hindu of an undivided family do so?—to any, and what extent?

3. Whether one of an undivided family, consisting of two only, may so dispose of half the property, leaving to the survivor the remaining half only?

Answer.

1. He can.

2. He can dispose of his share, though undivided.

3. There existing only two shares in the family, either parcener may bequeath his share.

It is thus ordained in Jagannatha, in the chapter called Daya Bhaga, and Datta pradanecam.

(Signed) VENCATASA, *Sastree.*

Remarks.

It may be asserted with confidence, in opposition to Vencatasa, first, that a Hindu cannot make a will at all; secondly, that, in case of family property, he can execute no deed that can have the effect of a will. Moreover, that no authority can be found, in the work to which he has referred, for the contrary opinion. The father cannot even divide property during his lifetime, otherwise than as prescribed by law; how then can he so

bequeath it after his death? If it be said that he must bequeath according to law, what then is the use of such an instrument? It will be answered, to direct the conduct of his children. To which I reply, True, such an instrument may be proper; but it is not a will, submission to it being optional. Vencatasa (the Pandit) did not understand the meaning of the word used to express the English term will, in these questions. E.

PROVINCIAL COURT, MASULIPATAM.

April 21, 1810.

Situ Binjee Ramandoss *Appellant;*
Baugheeradhi Boya - - *Respondent.*

Questions to the Pandit.

If a man should make his will, and deliver it to the person appointed by it to succeed to his estate, but the will be contrary to the disposition which the law would make, which takes effect, the will, or *Dharma Sastra?*

Answer.

Be it will, or any other instrument, if contrary to Dharma Sastra, it cannot be held good.

Remarks.

Most undoubtedly it cannot. What then is the will of a Hindu? If the distribution of property made by it be contrary to the provisions of the *Dharma Sastra,* it is invalid; if in conformity with them, it is unnecessary.

E.

PROVINCIAL COURT, CHITTORE.

April 22, 1808.

A Sudra left two wives, with one son by the first, and three sons and two daughters by the second; of whom a son and a daughter remained unmarried at his death. By a will that he left, he directed that, after certain deductions specified by him, his estate should be divided equally among his four sons. The will accompanies, referred to the Pandit for his opinion.

Answer.(1)

Examining the will by the various authorities on the subject of division of property, the first thing observable, is the promise mentioned in it of a thousand pagodas in jewels to the first wife, on taking a second, upon the alleged incapacity of the first to fulfil the conjugal rite, though it be admitted that she had borne the testator a son. If wealthy, he should have given her on the occasion a third of what he possessed; and at all events his obligation to maintain her continued. Supposing her not to have received any *Stridhana*, or portion from her husband, or father-in-law, she was entitled to so much as might be expended in the second marriage. Where there has been a *Stridhana*, it should be deducted, and the difference given.

(1) Vid. post, p. 423.

The will further directs that a hundred pagodas should be allowed for the marriage of his youngest son, a hundred for his education, and another hundred for his livelihood; besides the jewels worn by him, his shawls, and best clothes, with the silver and brass vessels, cot, chest, &c. and furniture. It being agreeable to Sastra that, when brothers divide, the marriage of an unmarried one should be provided for out of the common stock, an allowance on this account is proper; but, as the younger son is to share the residue of the paternal property equally with his brothers, the deduction of two hundred pagodas for his education and livelihood is objectionable. And, as the allowance grantable from the common estate of one-twentieth extra for the eldest son, a fortieth for the middle one, and an eightieth for the youngest, is abrogated in the *Cali yug*, his making a deduction of jewels, &c. in favour of his youngest, without any correspondent gift to his eldest and middle one, is entirely contrary to Sastra.

The will goes on to give to the unmarried daughter the jewels worn by her, with a hundred pagodas for her marriage, and another hundred for more jewels. The appropriation of the jewels worn by her is right. There being four sons, and one unmarried daughter, her proportion of the estate is a *twentieth part*. If therefore the two hundred pagodas, bequeathed for her wedding and future ornaments, do not exceed a twentieth(1) of the property left, the bequest is good; otherwise, not.

(1) There may be authority for this; but one-third from each share is the preferable law.

As to the bequest of their jewels and clothes to his wives and daughters-in-law, it is good only for those that have been commonly worn by them, not for any others. If among the latter there is any great difference among them in point of value, there should be an apportionment.

As in the Saraswati Velasa, in which the customs of the different casts are declared, *Patni bhaga*, or parts by wives, is distinctly stated as the law of the Soodra; the will in question having substituted *Putra bhaga*, or parts by sons, being the will of a Sudra, is in this respect exceptionable. (1)

The appropriating the *dulvar*, garden at *Conjiveram* to charity, and declaring it not to be saleable or mortgageable, with a direction that, after the expenses attending it shall have been paid, the residue of the profits should be given to the church; this is consonant to *Sastra*. All parties should take care that the repairs are done, and that the charity be supported.

(Signed)

ALEGA SINGARA CHARY, *Pandit*.

Remarks.

Mr. Colebrooke's carent.

This is an excellent opinion, as are most of Singara Chary's. One or two points may be disputable, but the whole evinces consideration, knowledge, and judgment. With respect to the latter, however, I must make an excep-

(1) Vid. ante, p 285.

tion to the last paragraph but one, "as in the Saraswati "Velasah," &c. It is true that *Patni bhaga*, division by wives, exists, and is allowable among Sudras; but the authority quoted does not intend that it is "essential" to them. If it had been proved that *Patni-bhaga* had customarily existed in the *cula* (tribe) to which the parties concerned in the suit belong, it should be admitted; if not, the general law must in all cases be preserved: it was a mistake, therefore, in the Pandit to question the will for not following the division by *Patni-bhaga*. Why indeed he refers to the Saraswati Velasa at all may be asked, considering that the Mitacshara and Madhavya are of much higher authority, in the country where the court to which he belongs is established, and that these do not even recognize the *Patni-bhaga*.

In another point of view, this opinion is very satisfactory; I mean, as regards the competency of a Hindu to make a will. Alaga Singara's authority must be admitted to be good, if the opinions in all the cases referred by the Provincial Court at Chittore (by far the most correct of any in these papers) be his. And it is evident that he does not acknowledge validity in any bill, but as it agrees with the distributions of the *Sastras;* which, no doubt, is the correct result in law. What then becomes of the legality of admitting them to probate, in the manner practised in the several Supreme Courts; a course that has always appeared to me incongruous? E.

ZILLA OF CHINGLEPUT.

July 9, 1803.

A man having, for a length of years, fostered and maintained a boy, not his son, on his death-bed directed half of his estate to be given to his son, a quarter part to his brother-in-law, and a quarter part to him whom he had so bred up: but the gift was not in writing. It is proved however, by two witnesses. Is it good by the Sastra, or not?

Answer.

If one having maintained another for a long time, should be inclined to give him and his brother-in-law a moiety of his property, giving the other moiety to his son, he should do it in the presence of his relations, and of some of the people of the village where the land, if any, lies. Should his death be too sudden to admit of their attending, provided he had declared his intent, and poured water into his hands in the presence of his wife and son, and of the people about him, it should be equivalent to its being committed to writing. And though even this formality should not be observed, it will be good in law for money, though not in regard to land.

(Signed) T. KISTNAMA CHARY.

Remarks.

This is gift in contemplation of death, subject to the general rules regarding gift. See Mit. on Inh. ch. i. sect. i. §. 31, as to the form. C.

The whole formality must be completed with regard to land, and possession must be given, or the act is invalid. But what has such a conveyance to do with a will? With the consent of his sons, and wife, and the knowledge of his nearest of kin, a man may make a distribution of his property according to the rules laid down by the law in such cases; and such distribution will be good, whether made on his death-bed, or at any other time, and whether confirmed by writing, or not. But how does such an act resemble a will? E.

ZILLA OF VIZAGAPATAM.

If a man in the Cshatrya tribe shall have disposed of his estate to a near relation, by means of an instrument purporting to be a will, leaving a childless widow, and a childless stepmother, surviving him, will it be repugnant to the Hindu Shaster to give effect to it?

(Signed) GEORGE PASKE, *Judge.*

Answer.

A Cshatrya having neither son, grandson, or nephew, may dispose of his estate as he thinks proper, subject to the obligation of him, in whose favour he does so, to support the females of the family, so long as they conduct themselves properly, they having no other means of maintenance.

(Signed) DUSKY NARRAIN, *Sastraloo.*

Remarks.

The wife succeeds of right in this case. Dusky Narrain supports the common opinion of the wife being entitled to maintenance only. This is not law, as I have already shewn. This instance is almost the only one in which I have had occasion to differ with this Pandit. E.

The first part of this is conformable to the law of gifts, to which wills must be assimilated; not being otherwise known to the Hindu law. The maintaining the females is a moral, rather than civil, obligation in the legatee. C.

Where a native of Bengal, of the name of Juggul Kishn, had, by will, divided his property between his wife and son, making them his executor and executrix; and the Pandits, to whom it was referred, both as to the competency of the disposition, and the right vested by it in the widow, had reported in favour of its validity, and that the widow's power over the moveable portion of it was absolute;—the case and opinions, having been submitted to Mr. Sutherland, of Bengal, produced from him the following

Remarks.

With respect to the instrument submitted to the Pandits, I regard it as wholly valid, provided no part of the property conferred by it on the widow were real ancestral property. Such property, by the law as received in Bengal, Juggul Kishn could not aliene from his son without his assent; and it would not therefore pass to the widow by his will. The widow would have absolute power only over the moveable property she might acquire under it, but not over the real. A woman is independent with respect to her immoveable *Stridhana*, other than that derived from her husband.

The doctrine of the Mitacshara, and other authorities of the same school, is mostly at variance with that of the Bengal. In conformity with such doctrines, I am induced to believe, that the instrument in question would

pass no real property of whatever description to the widow; it not being, according to them, competent to the husband to make such a gift to her, without the assent of his sons; which, from all that appears, was not in this case obtained.

It may be observed that, in the proper chapter, the Mitacshara is wholly silent on the subject of the power of women to alienate their peculiar property; though explicit in disavowing all authority in the husband, &c. to appropriate the same. A text of Vishnu is cited in the commencement of the work on inheritance, to shew that property is not by birth alone; from which text it appears, that, with the exceptions of immoveable property, on the death of the husband, the wife may dispose, as she pleases, of his affectionate gift. (1) S.

(1) See Mit. on Inh, ch. I. sect. i. 20.

Answers to the annexed Questions, by Mr. Colebrooke.—(See Letter dated Calcutta, May 18, 1812. ante, p. 134.)

Quest. 1st. Can a Hindu dispose of his property by will?

After much consideration of the question, when agitated some years ago, it was here settled, that a will, (though this disposal of property be unknown to the Hindu law, as was remarked by Sir William Jones,) must nevertheless be held valid in the case of a Hindu; being in fact a gift made in contemplation of death, which the Hindu law, if it do not directly sanction, contains at least nothing to prohibit. Considering it then as a gift to take effect at a future time, determinable by a certain event, (decease of the giver,) I apprehend it must be governed and controlled by the general rules regarding gift.

2d. Can a Hindu of an undivided family do so, and to what extent?

According to the authorities of Hindu law which prevail in Bengal, a member of an undivided family may give away, or otherwise aliene property, to the extent of his own share of the joint wealth: and I conceive his disposal of his property by will would be here maintained, *i. e.* within the limits of that province, in conformity with Jimuta Vahana's doctrine, that the gift or other alienation, by an unseparated coheir, may be an immoral act, but is not an invalid one. (Daya Bhaga, ch. ii. §. 28. Jagannátha's Digest, vol. i. p. 455.—vol. ii. 103 and 104. 8vo.

ed.) It would be otherwise in the rest of the provinces. The writers of the Tirhoot school contend, that the gift is void: and the reasoning, by which they support this position, is perhaps carried too far, as it extends to the annulment *of an improvident* gift by a single owner. The same may be said of the Benares school.

The authorities which prevail in the Peninsula, or South of India, are nearly as explicit. The Smriti Chandrica declares, that restitution of an unfit gift, (*adeya,*) as well as of a void donation, (*adatta*) shall be enforced by the sovereign authority, because the property is not transferred, nor a new right vested, since the donation is ineffectual when a void gift is made and accepted. An author of eminence in the Benares school (which follows the authority of Vijnyaneswara's Mitacshara) cites this passage, and apparently acquiesces in the doctrine, remarking, that " a man's own acquisitions may be aliened by " him, even without the consent of unseparated brethren." (Such acquisitions, it is to be observed, are the acquirer's separate property, and stand therefore upon different grounds.)

Neither this author, nor any other of the same school, so far as I can find, take the distinction which those of the Bengal school assume, between gifts exceeding, or not exceeding the giver's own share, and between void donations, and unfit gifts. Lawyers of Bengal hold, that an unfit gift, (*adeya*) to which class this of undivided property belongs, is immoral, and even punishable, but not void, nor voidable; while one of the other class, termed void donation, (*adatta,*) is null, and also punishable. The Mitac-

shara of Vijnyaneswara makes no such distinction nor exception, though the author explains unfit gifts as comprising, 1st. Such as are not fit to be given for want of proprietary right; and, 2dly. Such as may not be given by reason of an express prohibition. I am entirely at a loss to conceive on what grounds Jagannatha asserts in his Digest, (vol. ii. p. 105.) that his mode of reconciling the discordant opinions of authors, by maintaining the coheir's alienation of joint property to the extent of his own share of it, is consistent with the opinion of Vijnyaneswara. The alienation of joint property is comprehended in this author's class of *gifts unfit*, because they are prohibited: and the only distinction that seems fairly deducible from his doctrine is, that gifts unfit by reason of the want of proprietary right, are necessarily null and void; but that gifts unfit, because they are prohibited by general rules, may be valid under the exceptions which the law allows: such as distress, necessary support of the family, and pious purposes arising from indispensable duties. (Mit. on Inh. ch. i. sect. i. § 29.)

It may be objected to Vijnyaneswara, and the Smriti Chandrica, that the texts, which prohibit gifts of any portion of joint property, or of the whole of a man's sole property, thereby distressing his family, equally forbid sale and mortgage of it: so that these also would be void, although a valuable consideration have been paid and received. Injury and injustice may, however, be prevented, by holding him and his property answerable for the repayment of the money or valuable consideration received by him: and equity perhaps would award parti-

tion, for the purpose of enforcing payment from his share, thus rendered a separate one. (1) But, in the case of a gratuitous alienation, there are not the same difficulties: and I apprehend, that, under the Hindu law, as received among those with whom the Mitacshara and Smriti Chandrica are the chief authorities, it must be held that the disposal by will (considered as gift) of an undivided share of joint property, is not valid; nor of any part of it, unless for pious purposes, or other uses incumbent on the testator to provide for, and falling within the exception which the law makes to the general prohibition.

Accompanying, is a collection of passages from writers of all the different schools relating to this point.

(1) Vid. ante, p. 283.

Extract of a Letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, May 25, 1812.

When writing a few days ago, I stated that I thought a Hindu's will and testament must be governed and controlled by the general rules respecting gifts. It will hold good, I think, for the same things for which a gift made in his lifetime would do so, and no otherwise.' I should have added, however, that his legacies to his family must be controlled by the rules regarding partition made in his lifetime by him, as father of the family. The principle I would lay down, is, *that a man cannot confer on a stranger, or his own kin, by will, (which I consider to be a donation in contemplation of decease,) what he could not bestow by deed of gift, or partition of patrimony.* The utmost that can be said, is, that he may do that by testament, which he could have done by partition, or donation between living persons. This is allowing all the force that can be given to a will, by taking it as a gift, in regard to what the testator has power to give; and, as a partition of inheritance, in regard to what he can distribute, but not give away.

The Pandit, who set about reforming a will to make it square with the law, in the case before the Court of the Centre Subah,(1) seems to have viewed the testament exclusively as a deed of partition of heritage.

Upon the principle which I have stated, a *Hindu in Bengal may leave by will all his own acquisitions: but*

(1) Ante, p. 410.

would be restricted, if he have sons, from distributing ancestral property according to his mere pleasure. In provinces, in which the authority of the Mitacshara prevails, a Hindu is restrained from giving away immoveables, and from making any other partition of his possessions among his male descendants, but such as the law has sanctioned. Consequently, he would be withheld from distributing immoveables in a mode unauthorized by the law, but may bestow moveables, of which the law permits him to make gifts on motives of natural affection: not, however, to the extent of his whole property.

In short, if there be no sons, or male descendants, and the property be not shared by a co-heir, the whole of his possessions, being his separate and distinct property, may be disposed of by will, as he pleases. If he have a coparcener, he cannot give away his entire share of the joint property; nor the whole of his possessions, if he have sons.

Extract of a Letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, July 22, 1812.

Upon reference to adjudged cases, and upon consideration of the inferences to be drawn from them, and the principles held to have been settled by these judgments, I find occasion to correct that part of my letter on the subject of wills by Hindus, in which I said that a Hindu in Bengal may leave by will all his own acquisitions; but is restricted from distributing ancestral property among his children, according to his mere pleasure.

It is true, that if he make a formal partition of heritage, he is subject to restrictions; and no express decision has weakened the strict rule of law on this point. But a deed of gift, by which the ancestral property was unequally distributed, (or was given to one son with a very inferior provision for the rest,) has been held valid by a solemn decision of the former Court of Sudder Dewanny Adawlut; and I understand that, in numerous instances, wills of Hindus, disposing of the ancestral as well as acquired property, according to the testator's pleasure, have been allowed by the Supreme Court.

It appears to me an inconsistency, that a man may do that by gift or will which he may not do by a formal partition; and the Hindu legislators might have saved themselves the trouble of providing rules to regulate a father's distribution, if the whole may be evaded by the easy expedient of calling the distribution a gift, instead of a par-

tition. But since the point is here a settled one, what I said on the subject may require modification. A Hindu in Bengal may leave by will, or bestow by deed of gift, his possessions, whether inherited or acquired; and the gift or the legacy, whether to a son or to a stranger, will hold, however reprehensible it may be, as a breach of an injunction and precept.

Extract of a Letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, Dec. 3, 1812.

In respect to a Hindu's will, I have, according to my promise, examined the Smriti Chandrica, with the view of furnishing any further information it might contain on the doctrines of Hindu law, which can be brought to bear on the case in question.

I find much difficulty, adverting to the positions maintained in that work, to admit any power in a joint owner to give away his proper share, yet unseparated, of the common property, whether by will, or by gift in his lifetime, without the consent of his undivided brethren. The author of the Smriti Chandrica, speaking of common property, of which a gift is forbidden by the law, observes, that this regards common ways, and other things common to many; but property belonging to an undivided family (he says) may, in certain circumstances, be given away, since the consent of all parties concerned may be easily had in this instance, though not so in the case of a public way, common to great numbers. It is afterwards observed, that an owner may give away his own acquisitions, without the consent of his undivided brethren, but not so joint hereditary property. The author, however, goes still further in regard to *immoveables;* restricting a *sole owner* from selling, pledging, or giving away, without consent of kindred, *immoveable property acquired by himself, unless* it exceed the necessary subsistence of the

family, or unless the wants of the family, or other distress, require it to be parted with.

This last restriction naturally suggests the doubt, whether the prohibition in this, or in the former case, is to be taken as invalidating the act of an owner, who shall persist in disposing of his property against the injunctions of the law. But no hint of such a distinction (which is to be found in the writings of the Bengal school, between gifts valid, though forbidden, and gifts either void or voidable) is contained in the Smṛiti Chandrica. The author, on the contrary, maintains, that forbidden donations shall be set aside by the sovereign authority; and it seems more consonant to his doctrine to say, that the owner's disposal of his share of undivided hereditary property, without assent of partners, is voidable.

I intended to have completed a similar examination of the Madhavya, with reference to the same point; but the book is not just now at hand.

Extract of a letter from Henry Colebrooke, Esq. to Sir Thomas Strange, dated Calcutta, Dec. 26, 1812.

I have examined the Madhavya since I wrote to you; and find nearly the same opinions as in the Smriti Chandrica, more concisely expressed; but with a restriction of some importance. Madhaveya observes, in regard to moveables, that property, which a man himself acquired, may be aliened by him, without the assent of his brethren, with whom he has made no partition of wealth; but not so in regard to immoveables; adding the remark, that property inherited from ancestors may be given away by the chief brother, with the assent of the rest. He appears to consider all the passages cited by him in this place, as relating to immoveable property; and it may therefore be questioned, whether he contemplated any restraint on a joint proprietor from giving away moveables, not exceeding his own share of undivided wealth.

The subject is certainly one of considerable difficulty; and I have all along felt much at a loss to give a decided opinion on the question of a Hindu's will, under the law, as it prevails in your part of India.

BENGAL.—ZILLAH BAKUR GUNJ.

Chundra Mala—A . . .	*Appellants.*
Ubhya—B	
Ram Priya—D	*Respondents.*
Daughter of Oopurna—C	

Lukhee Priya, a woman of the Hindu persuasion, and a widow, had four daughters, A, B, C, and Pran Priya deceased; in favour of whom she executed a deed of gift, by which she assigned a share in a Zemindary to those persons, to be equally divided amongst them, inserting, however, in the deed the following provision: "That, during her life, she should make the collections of "revenue as before, through her agent, but that, after her "death, her four daughters, with their husbands, should "be fully in possession of their several allotted shares." During the lifetime of Lukhee Priya, her daughter C died, leaving a husband, and a daughter, D, who claims the share of her mother. The Pandits of the Sudder Dewanny Adawlut were required to state whether, under these circumstances, such claim is valid, according to the Hindu law.

The substance of the answer of the Pandits was as follows: That, supposing the deed of gift to have contained a restriction, (niyama,) that the donees should have no property in the gift (*i. e.* be incompetent to give or sell it) till after the death of the donor, and that it had been

executed, without the sanction of her (the donor's) guardians, (a gift so made being invalid,) no right in C, who died before the donor her mother, to the share assigned to her in the deed, was established; and, consequently, *á fortiori*, none existed in her daughter D. That the right in the share in question reverted to the donor.

Authorities cited.

From the Sudhitatwa, a text of Nareda cited in the Daya Bhaga and other books, and a text of Catyayana.

The first shewing that a gift involving a condition, is not *valid*, till the accomplishment of such condition.

The second shewing the dependency of a childless widow on the "*Swatantras*," or her guardians of her husband's family.

The third shewing that the gift, or other alienation of land, &c. made by a widow, (aswatantra,) without the leave of the *Swatantras*, is not valid.

In illustration of, and resulting from the above exposition of the law, (Vyavastha,) the Pandits made the following explanation, and declared the subjoined points of Hindu law.

No right of D, under the circumstances of the case, would have existed, allowing that Lukhee Priya had obtained the leave of her guardians to dispose of the property as expressed in the deed.

The mention of such leave was only made, to shew the necessity for it, in order to give validity to such an act of the widow Lukhee; and consequently the validity or

otherwise of the gift made in favour of the three donees, who had survived the donor, depended on the circumstance of the donor's having, or not having, obtained the leave of the persons alluded to. The Pandits, it was to be observed, did not from the deed (written in the Bengallee language) understand it to contain any thing establishing the right of the husbands, as joint donees with their wives, the daughters of the donor: which might be inferred from the statement of the case. The points of Hindu law declared by the Pundits were these:—

Whatever act affecting his property a Hindu was competent to perform, his widow, on whom such property by the operation of the law may have devolved, with the sanction of her guardians, may execute. In Bengal, according to the law as there received, a Hindu may aliene, by gift or otherwise during his life, to whomsoever he pleases, land, and other property, *without reference* to the *manner* in which the same may have been *acquired.*(1) Should he give away, or otherwise aliene *patrimonial* land, without the concurrence of his sons, in a manner other than that in which it would have devolved by law, such gift, or

(1) This is the tenour of my MS. containing the result of the conference which I had with the Pandits of the Sudder Dewanny. I well recollect more than once minutely explaining to them what I had written, and their admitting that I had correctly stated their opinion. It appears, however, that an inadvertence on their part, or a mistake on mine, was here committed. By the doctrine of the Daya Bhaga (which is the groundwork of the Hindu law of inheritance, as received in Bengal,) it is most clear, that a man may not aliene his real ancestral estate without the consent of his sons, &c. And this indeed have the same Pandits, on other occasions, adopted as their opinion. There is no part of the Daya Bhaga so unsatisfactory, as that where the author attempts to prove the absolute right of aliening self-acquired real property; and it may be observed, that the argument used would be equally good, to establish the validity of the transfer of the same property ancestral. S.

alienation is valid, although morally wrong, and the person in question is guilty of an immoral act thereby.

By the doctrine of the Benares school, and that current in the tract of country designated Mithila, a Hindu may only give away *moveable* property, however obtained. Whatever a Hindu, according to his pleasure, is competent to give, whilst living, he may assign in the same manner by a will, (*sumbit patra,*) or deed of gift, to take effect after his death. A power, however, of revoking such will, or post-obit gift, always exists; and such a gift or legacy lapses, by the previous death of the donee, or legatee; or, in other words, reverts to the surviving testator, or donor: a difference however prevails, with regard to the act of the husband, and that of the wife, on whom by operation of the law his estate has devolved. He, in his lifetime (in Bengal) might have given away his real estate in any manner, against the consent of his sons, or the heirs, on whom it would devolve by operation of the law; being guilty only thereby of an immoral act.

The wife, on the contrary, on whom her husband's estate has so devolved, must, in the case of her wishing to give away any of such estate, in a manner other than that in which it would devolve by operation of law, *not only obtain the sanction of her legal guardians, but also that of the next heirs; or those whose eventual right would be affected by such gift.* It is to be observed that, in the case in question, the donees are the next, and presumptive heirs to the donor; and the object of the gift appears to have been that of obviating any contingent disqualifica-

tion to right by inheritance, or the operation of the law; as, for instance, if either of the daughters should prove barren, and become a childless widow, in which case such daughter, though not an heir, would take, in virtue of the deed of gift, an equal share with her sisters, the whole having tacitly given their assent to their mother's executing a deed, by which a right in the estate might possibly be established in one, not competent to inherit.

S.

Ishaun Chund Roy, . . . *Appellant.*

v.

Ishwar Chund Roy, . . . *Respondent.*

Appellant is the uncle of Respondent, the present Raja of Nuddea; and claims from him one-fourth of that Zemindary, upon the ground of his being one of the four sons of Raja Kishun Chund, (the grandfather of Respondent,) and therefore entitled to one-fourth of his landed property, agreeably to the Hindu law. It appears that Raja Kishun Chund bequeathed by two wills (the one in the Bengallee, the other in the Persian language) the whole of the Zemindary to his eldest son Seebchund, who accordingly succeeded to the Zemindary, and obtained a Dewanny Sunnud from government. Raja Seebchund also bequeathed the whole of the Zemindary by will to his eldest son Ishwar Chund, the Respondent. The authenticity of the above wills is established; and a majority of the Pandits referred to have declared them valid, according to the Hindu law. It further appears, from the genealogical table of the family, delivered in by the Canongoes, that the Zemindary of Nuddea has never been divided; and by the 137th article of the Regulations, it is directed that, in cases of succession to Zemindaries, the judge do ascertain whether they have been regulated by any general usage, of the Pergunnah where the disputed land is situated, or by any particular usage

of the family suing; and do consider in his decision the weight due to the evidence on this head. It appears therefore that the Appellant's claim is contrary both to law, and the usage of the Zemindary.

The Appellant, however, is entitled to a maintenance; and the judge has awarded to him the further sum of S^{a}. R^{s}. 250 per month, to be paid from the Zemindary, in addition to the sum of 250 R^{s}. before received by him; upon the ground that the former sum was inadequate to his situation and circumstances.

(Signed) G. H. BARLOW,

Examiner and Reporter to the Sudder Dewanny Adawlut.

Feb. 23, 1792.

Answer of the Pandit of the Court of the Recorder of Bombay,

Upon a reference to him as to the competency of a Hindu to dispose of his property by will, considering him first, as a member of an undivided family, and next as divided. Communicated by Sir John Newbolt, acting as Recorder.

There is no mention of wills in our Shaster: therefore they ought not to be made. If it be said that it is lawful for a father to divide his property during the life, that is true; but then it must be done agreeably to the Shaster; he cannot divide it according to his pleasure; and if he does, his partition will be liable to be corrected; so that the Shaster is the only rule. An undivided family having no power individually, but collectively only, no member can, without the concurrence of all, (express or implied,) dispose of any thing. Where a division has taken place, and the family of the individual is sufficiently provided for, an alienation is competent, but not even then of the immoveable property. The deceased member of an undivided family leaving no son, his share of the joint property does not descend to his widow, but survives to the brothers, or other co-heirs. Thus I have written what is the practice of this country.

(Signed) BAPOO, *Pandit of the Recorder's Court.*

4th Madhow of the dark fortnight,

1734, *of Salivahan.*

FROM THE PANDIT OF THE COURT AT TELLICHERRY.

1. Can a Hindu dispose of his property by will?

According to the text of Nareda, the father is not at liberty to dispose of his property except in due proportion to all his sons, and according to the Shasters; nor does the Shaster authorize a person to dispose of his property at discretion.

2. Can a Hindu, of an undivided family, do so to any and what extent?

According to the text of Yajnyawalcya, the father has control over pearls, corals, and such like valuables; immoveable property appertains to the issue of the family; the father and grandfather have no control thereupon. The father may, however, bestow clothes and ornaments at pleasure; and the receiving and using the same is warranted. The receiving and using immoveable property from the father, will not be held valid. Although the father himself should have acquired property, in addition to the ancient immoveable property, as also bondsmen, he is not at liberty to dispose of the same by sale or gift, without the consent of the family. Such is the ordinance of the Shaster. A member of an undivided family, may, however, dispose of a trifle out of the moveable property, as before observed.

3. Can one of an undivided family, consisting of two only, so dispose of half of the property, leaving his coparcener's moiety undisturbed?

It is stated in the text of Nareda, that it is necessary a division should be previously made, with the concurrence of all the members; wherefore the disposing, to the extent of one's share at discretion, is not legal.

Extract of a Letter from Sir Thomas Strange to H. Colebrooke, Esq. dated October, 12, 1812.

With regard to the question about wills, it came before us in an equity suit, in which an annuitant called upon the Defendant, an executor, to make good to him a provision left him by the will of the Defendant's testator, the parties being Hindus. The Defendant was nephew to the deceased, who had taken upon himself to dispose *ad arbitrium* of a very large undivided estate, consisting of property of every description. We thought, and held it doubtful, whether a Hindu could make a will at all; and, at all events, it seemed to us, that he could not so dispose of *undivided* property. The bill was therefore dismissed, the Court not having perhaps sufficiently considered whether he might not do so, to the extent of his own share, especially so far as acquired by himself; assuming, for the sake of argument, the competency of this mode of alienation. Our decision was recent, when I took the liberty of troubling you with questions on the subject; and the property being more than considerable enough to bear extended litigation, we have since directed the cause to be reheard, that these important points, hitherto afloat with us, may be solemnly settled. It will be reheard in the first term of next year. It gives me great satisfaction, in the mean time, to see that you were to be good enough to look into the authorities prevalent with us, expressly for the purpose of enabling you to tell me what the law upon the subject is in this part of India, without regard

to the decisions of the Sudder Dewanny Adawlut, or the Supreme Court at Bengal, founded, as they must be presumed to be, upon doctrines that may not have been adopted to the Southward. Lord Mansfield once, in the case of a void will, took occasion to observe that the Statutes of Distributions (as they are called) had made an exceeding good will for every man. The observation is, I think, applicable to the Hindu, with whom the law of inheritance seems to me to be well and equitably settled; and, supposing the point to be one of a merely speculative nature, I would rather have property allowed to descend among them, according to their ancient canons, than leave it to every man to prescribe for himself a new law of succession. One thing I observe in all the wills made by Hindus of Madras, that a great proportion of the property is bequeathed to superstitious uses; the proportion is commonly in the ratio of the iniquity with which it has been acquired, or of the sensuality or corruption to which it has been devoted. *Sic hi non ipsis mellificant.* I would rather see it distributed in their families, &c. &c.

APPENDIX TO CHAP. XIII.

PROVINCIAL COURT, CHITTORE.

June 21, 1811.

On an engagement in writing, to pay a sum of money, the Defendant admitted the writing, but refused to pay, alleging that he gave it for an appointment to the situation of *Sheristadar*, and for no other consideration. The Plaintiff proving no other, the Pandit reported as follows:—The engagement is void by the Hindu law, the consideration being a corrupt one. If one, sued for a debt, disputes it, but it is proved against him, he must not only pay the demand, but, for falsely denying it, he is liable to be fined in a sum equal to the amount. On the other hand, if the Plaintiff fails, he is liable in double the amount, for his false claim.

Remarks.

"The Hindu law allows a corrupt payment to be re-"covered, on proof of the corrupt consideration. Ja-"gannatha's Digest, b. ii. ch. 4. lx. For the law im-"posing a penalty on the party that is cast, See Id. b. i. "ch. 6 cclxxvi." C.

"Falsely denying," and "failing in proof," are terms admitting of great latitude of interpretation. Construing

the words of the Pandit literally, it would appear he thought an equal sum should be taken from the Defendant, and double from the Plaintiff, on their respectively failing in their suit, or defence; but this is not the law. The law is, that these are the highest rates of fine, that are in any case to be imposed; to be mitigated, or relinquished altogether, as the king, in his discretion, may judge of the conduct of the parties. Menu says, "a small fine" only shall be taken from the Defendant; and certainly, the moral guilt of resisting a just claim, can never be so great as that of pursuing a false one. Other authorities ordain other rates for both. E.

ZILLA OF BELLARI.

July 1, 1807.

Timmarah, *v.* Veneapah.

Upon the trial of this action, a certain sum has been awarded to the Plaintiff, which the Defendant is incapable of paying; but the Defendant's son has a shop in Bellari, where he carries on business, and no division of property having taken place between the father and son, does the Shaster authorize the son's being called upon for the sum in question?

Answer.

For a debt incurred on account of the family, the head of it shall be held responsible; but, should a father contract one for the purchase of spirituous liquors, or debauchery, or other improper objects, it is not obligatory on the son; nor shall a son be called upon to pay his father's debts, till he have attained his legal age. Subject to these considerations, it appearing in the case referred, that the Defendant's son is on the spot, and the father insolvent, the son ought to pay the sum in question.

(Signed) RUNGACHARY, *Pandit.*

6th July, 1807.

Remarks.

See Yajnyawalcya, cited by Jagannatha, b. i. v. 170, and the Commentary.

It is not expressly said that the debt shall be paid by the son, in the lifetime of his father, who is insolvent. It is however declared, that he shall pay the debt of a father, who is oppressed by calamity, such as incurable disease, &c.; and that even though no patrimony come into his hands. But, according to the remark of Sir William Jones, the obligation is moral and religious, not civil. See note to 1 Dig. p. 266. C.

ZILLA OF BELLARI.

December 8, 1807.

Pamdhortee Vencata Row, *v.* Shekh Munktoom.

The Plaintiff in this cause, during the absence, and without the knowledge of Defendant, got a bond executed in his favour, purporting to be the obligation of the Defendant, and the Defendant's mother; but subscribed by the mother alone. This being the case, is the Defendant responsible for the amount?

Answer.

According to Kartyancha, " when a man leaves his " home, and a debt for the good of the family is con- " tracted, whether by his slave, his mother, his wife, or " his scholars, the head of such family must pay the debt; " and if he is absent, his son must discharge it." In the case before us, if the Plaintiff got the Defendant's mother to write a bond in his favour in her own name and that of her son, without informing the Defendant thereof, it is not a good bond; yet, if the mother contracts a debt to defray the family expenses, the son must pay it; but if it was contracted on her own account, she must pay it herself.

(Signed) RUNGACHARY, *Pandit.*

Remark.

Unless there is positive proof that the debt was contracted for the support of the family, destitute of all other means of subsistence, the son would not be liable in this case. E.

See the principle stated in Jagannatha's Digest, book i. texts clxxxix. cxci. cxcii. cxciii. and clxxxi.

ZILLA OF COMBACONUM.

Feb. 26, 1807.

The Plaintiff lent five hundred gold chuckrums to one Chinnapan, the son of the Defendant, who thereupon gave him a writing for the money in the name of his father; and Chinnapan being since dead, is the debt recoverable against the Defendant, the father?

Answer.

There being no proof that the writing was given by the authority of the father, or for the support of his family, it cannot be enforced against him.

Remarks.

"See Nareda, cited by Jagannatha, Dig. b. i. text "cxciv." C.

"Certainly not." E.

ZILLA OF COMBACONUM.

May 3, 1808.

Upon a judgment for the Plaintiff, and an order to sell the lands of the Defendant in satisfaction, a third party intervening, alleges the land to be in mortgage to him, for money borrowed, of which proof is adduced. Is the land, under these circumstances, liable to be sold in satisfaction of the judgment, subject to what is due on the mortgage?

Answer.

It may be so sold, for the proposed purposes.

Remarks.

" Certainly it may be sold, subject to the mortgage. " See Jagannatha, on a passage cited in the Dig. b. ii. " ch. iv. 28." C.

" This species of assignment of land is in very frequent " practice, where proprietary right in land exists, and is " commonly called *Bhogyam*, ' *that which is to be en-* " ' *joyed.*' The holder of land in *Bhogyam* tenure is, in " every thing but name, the owner; he cultivates, pays " the land-tax, and all other dues, and enjoys the whole " produce; and he may also, if there be no special agree- " ment to the contrary, dispose of his interest in it. The

" original proprietor retaining solely a right of redemption,
" (never abateable,) it is this latter right only that is sale-
" able, to answer any other demand upon him. In the
" province of Malabar, whole districts are thus hypo-
" thecated, the *Jummum* right, or superiority, is con-
" stantly transferred, without in the least affecting the
" occupancy of the land, or the rights of the occupier."

E.

ZILLA OF CHINGLEPUT.

July 10, 1807.

Kesavummall, *v.* Sreenivasiangar.

On examination of the accompanying petition and depositions, &c. it is referred to the Pandit to say, whether the Plaintiff's suit be maintainable for the land mortgaged to him, or for the money lent?

Answer.

The term stipulated for payment having expired, and the money not paid, the land having been assigned for enjoyment, the Plaintiff can sue only for the land, not for the money borrowed upon it.

(Signed)

TEROOMALY KISTNAMA CHARIAR, *Pandit.*

Remarks.

There is nothing directly in point.—If a sale were in the contemplation of the parties, it is become absolute, and no suit can be brought for the money. If the usufruct were accepted in lieu of interest, the creditor could not come upon the debtor for the insufficiency of the pledge. But if the pledge were merely security for the debt, surely the creditor may claim his money. C.

Lands held in *Bhoagyam*, under agreement with the proprietor that they shall pass in full proprietary to the

holder, in case certain conditions are not performed, pass accordingly, on failure in the performance of those conditions. Money cannot be recovered, because the payment of money is not stipulated. E.

ZILLA OF CHINGLEPUT.

August 20, 1803.

Above thirty years ago, the owner of a garden mortgaged it for forty pagodas, agreeing that the lender should have the use of it, in lieu of interest; but without delivering the garden accordingly. Is the money, which remains due, still recoverable?

Answer.

The money borrowed, with the interest due upon it, is recoverable. If the debtor be unable to pay, the mortgaged property must be sold, and what is due discharged out of the proceeds.

Remarks.

The default of the debtor, in not delivering the pledge, certainly did not exonerate him from the debt. But the lapse of time might have been taken advantage of against the creditor, who should have sued for the possession of the pledge which was withheld (Vrihaspati, cited by Jagannatha, b. 1. cxxvi.) within twenty years. (Yajnyawalaya, ibid. cxiii.) For, although pledges are excepted from the rule of limitation, the exception must be understood to relate to such as are in the hands of the pledgee. C.

To the same effect, by E.

ZILLA OF COMBACONUM.

April 2, 1811.

If lands are pledged as *Adhi* or *Bandhaca*, (two different forms of security,) with a condition, that if the money borrowed be not paid at the time agreed, the mortgagee shall enjoy them, upon the condition being broken, can the mortgagor redeem his land, by payment of the money after the time?

Answer.

If the land remained in possession of the mortgagor, he may;—otherwise, if the mortgagee had been let into possession.

Remarks.

There is not any passage of law expressly in point, regarding the distinction taken in the answer. It is assumed, seemingly, from passages, which inculcate the necessity of possession of a pledge. (Jagannatha, Dig. b. 1. cxxv. cxxvi.) If the creditor have possession of the pledge, or a lien on it, he should proceed in the manner indicated by passages of Yajnyawalcya, &c. (Jagannatha, b. 1. cxxiii.) In no case can the pledge be forfeited without that formality, or a time allowed to the debtor, (ibid. cxv. cxvi.) which implies notice to him. If he have not possession, he of course could not foreclose, without notice and application to a tribunal. C.

ZILLA OF CHINGLEPUT.

Jan. 15, 1805.

The Plaintiff sues on an instrument purporting to be a mortgage for money borrowed; but the mortgagee never having had possession, is it valid as a mortgage deed?

Answer.

The deed (referring to it) purporting that Veneatasa Pillay and Teroovergada Pillay had mortgaged the ground in question, and borrowed one hundred and eight pagodas, on condition that the money should be paid within a time that is past, and, if not, that then the lender should be at liberty to sell the land; the lender never having had possession of it under the deed, in any manner, or part, the deed has no validity as a mortgage deed.

(Signed)

TEROOMALY KISTNAMA CHARIAR, *Pandit.*

Remarks.

This is founded on passages which inculcate the necessity of possession, to ensure the validity of a pledge or mortgage. See Jagannatha, b. 1. cxxv. cxxvi. It is of course not applicable to a sort of mortgage much in use in Hindustan, termed *Drishta bandhaca,* where the pledge is assigned to the creditor as a security, without possession, or intention of possession, till the stipulated time arrive.

C.

Yajnyawalcya says, "In the acquisition, where there is "*not any* assignment, there is no validity." But the *least* would do :—for example, if the mortgage deed had been drawn up in the house mortgaged, both parties being present, *actual* enjoyment, (possession,) *or*, if the key had been delivered to the mortgagee, *virtual* possession might be inferred. E.

ZILLA OF CHINGLEPUT.

Jan. 15, 1811.

The land of the Defendant being under sequestration for a debt, it appears that it is under mortgage to another for money borrowed, but not yet payable. Can the sequestration be enforced?

Answer.

It having been agreed that the mortgagor should remain in possession, till default of payment, the house cannot be sold under the sequestration, till the mortgagee be discharged.

(Signed) ALEGA SINJARA CHARIER, *Pandit.*

Remarks.

This mortgage is of the description called in Hindustan *Drishta bandhaca.* Being prior to the sequestration, it must be satisfied, before any part of the mortgaged property is applied to the liquidation of another debt.

C.

To the same effect, by E.

ZILLA OF VERDACHELLUM.

Jan. 30, 1807.

Narrain, *v.* Soonia Moodiliar.

The father of the Plaintiff having, near thirty years ago, lent money upon mortgage, is a suit for its recovery now maintainable?

Answer.

1. When money has been borrowed on mortgage, without any period specified for redemption by payment, it may be sued for at any time.

2. Where a time is limited, but not kept, and the thing mortgaged has, in default of payment, been expressly substituted, a suit is not maintainable for the money, after fourteen days from the day of payment.

3. If the agreement be, that the lender should enjoy the profits of the thing mortgaged, in lieu of interest,—in such case, a right to recover continues as long as the money remains unpaid.

(Signed) SREENEWASA CHARLOO.

Remarks.

1. This is applicable, where the profits are not accepted in lieu of interest.

2. That is, if the creditor have foreclosed the mortgage, and taken the property in discharge of the debt, (Jagan-

natha, Dig. b. 1. cxvi.) he cannot afterwards come upon the mortgagor.

3. No suit can be maintained to enforce payment before the mortgagor is disposed to redeem his pledge. The creditor has accepted of the profits in lieu of interest, until the owner's convenience. C.

ZILLA OF COMBACONUM.

May 20, 1808.

Upon a note for a sum borrowed, payable at a certain day, is the lender bound to receive it, if tendered to him by the borrower before the day?

Answer.

He is not.

Remarks.

This is obviously right, though the Hindu law is silent on the point. C.

The Hindu law of contract being founded entirely on reason, and not on special ordinance, or national usage, the only observation of which the opinions ranging under this title are susceptible, is a general one; viz. that when they contradict common sense, they must be wrong. To this, I am aware of but one exception, namely, the assignment of rates of interest, increasing in the inverse order of the castes; a practice, though expressly ordained by the law, now seldom observed. E.

ZILLA OF BELLARI.

June 8, 1807.

Timmanah, *v.* Veneapah.

The Defendant, some years ago, executed a writing to the father of the Plaintiff, binding himself to the payment of one hundred pagodas, borrowed with interest at twelve *per cent;* and now the interest, exceeding the principal, to what extent is he liable?

Answer.

According to Menu, when the debtor, from the long standing of the debt, is unable to pay both principal and interest, he is compellable to pay the interest only, and to give a fresh engagement for the principal. If, in such a case, the interest equals the principal, the debt is to be liquidated by payment of one-fourth.

(Signed) RUNGACHARY, *Pandit.*

Remarks.

See Menu, ch. viii. v. 154. The principal can only be doubled. See Harita, cited by Jagannatha, Dig. b. 1. lix. &c. The authority for reducing the accumulated debt in such case to a fourth part, has not been found. C.

Menu is wrongly interpreted; and, from what Shaster the law of the latter part of the opinion is taken, it would be vain to inquire. The Plaintiff was entitled to recover the full amount of the debt, and interest not exceeding that amount. E.

ZILLA OF CHINGLEPUT.

Oct. 26, 1802.

S. Ramanjummall, *v.* Permall Naikin.

The Defendant became security to the Plaintiff for a sum of money borrowed by one Aude Naikin deceased, payable on demand. No demand was ever made on Aude Naikin during his life. Is the money recoverable of the surety?

Answer.

It is not, unless he have property in his hands belonging to the estate of Aude Naikin.

(Signed) T. KISTNAMA CHARIAR.

Remarks.

The decease of the debtor does not exonerate the surety, unless indeed he was merely surety for appearance; which does not seem to have been the case in the present instance. C.

If he have money belonging to the estate, he becomes liable, not as surety, but as receiver of the property; *vic tha gruhah.* E.

BOMBAY.

May 27, 1811.

If money be borrowed by one on the security of another, and the borrower residing out of the jurisdiction, the surety dies, can the debt be recovered against the son of the surety?

Answer.

The son of a surety for the *appearance* of another, is not liable for his father's undertaking; but the son of a surety for the *debt* must pay it, in default of the borrower; with this distinction, that the father is liable for interest, the son for the principal only.

(Signed) VISTRUE PANDOORUNG.

Remarks.

See Jagannatha's Digest, b. 1. cxliv. and clxii—clviii. C.

This is the law. E.

ZILLA OF BELLARI.

Nov. 17, 1807.

Samy Kesogee *v.* Gooty Curnum Appiah.

In 1798, the Defendant's father executed a writing for fifty rupees, payable in a month, and lived till 1802, without any demand having been made upon him for payment. The son, on this ground, resists the demand now made.

Answer.

The father who borrowed the money being dead, the son should pay it; a father's desire for a son being, among other considerations, with a view to his discharging his debts. Having been contracted within ten years, it is payable by him in the present instance.

Remarks.

Certainly ten years is the shortest limit of action known to the Hindu law. See Yajnyawalcya, cited by Jagannatha, b. i. 113. C.

To the same effect by E.

BOMBAY.

An acknowledgment of a debt in writing having been attested by one witness only, and the debtor denying his signature, can it be proved by the only attesting witness?

Answer.

If both parties have consented to abide by the evidence of one witness only, he may be received; but should either party object, his single testimony is inadmissible.

Remarks.

Yajnyawalcya authorizes the admission of a single witness, by consent of both parties. (Book ii. ch. iv. v. 5.) But Menu and Vyasa authorize it without this restriction. See Menu, ch. viii. v. 77. Vyasa's words are, "a witness, "who is unimpeachable as to his conduct, and acquainted "with his duties, and whose speech is conformable with "facts, shall be sufficient, though single, especially in the "case of violent crimes." The author of the *Virametrodaya* cites that passage in proof of the position, that "one "who is recognized by the king and the caste, as a just "and sensible man, may be singly a witness." C.

The best procurable evidence is, at the discretion of the judge, in all cases admissible. The consent of the parties gives it no additional validity. The admission of a single witness by consent, where the law without it re-

quires a plurality, applies to cases where doubts are to be cleared, not facts to be ascertained. As, where it is doubted whether the custom of *Stri-bhaga* exists in a certain caste;—a single instance cannot establish a custom; it requires many witnesses to prove it: many, perhaps, cannot be adduced; but there is a single person who happens to be well acquainted with the customs of the caste; he may be admitted, not to prove the custom—to that he is incompetent—but to clear the doubt. This, however, does not in any way apply to the case of a single attesting witness. If his credit be good, a single witness is as competent as twenty, to prove the fact of the instrument in question having been given by the Defendant. Three witnesses are mentioned in some texts as being proper, not necessary; and even the propriety is by some confined to cases where the contract is verbal, not written. E.

ZILLA OF VERDACHELLUM.

January 6, 1809.

P. Chedumbra Pillay, *v.* Conda Pillay.

The parties are cousins, between whom no division has taken place. Cooteya Pillay, the fraternal nephew of the Plaintiff, himself entitled to a share of the property in dispute, being called as a witness on the part of the Plaintiff, is he competent?

Answer.

Cooteya Pillay, being himself a parcener, is not examinable as a witness on the part of the Plaintiff.

Remarks.

Those must not be admitted who have an interest in the matter. See Menu, ch. viii. v. 64. C.

The law says, and the authorities are many, that, in cases of partition, the evidence of kinsmen is not only admissible, but preferable. In all cases, however, evidence must be regulated by discretion; and, notwithstanding, therefore, the preference given by the law to kinsmen, in cases of partition, the judge ought to reject doubtful, corrupt, or manifestly partial evidence. But, in the present case, putting the two first out of consideration, what cause was there to fear, that the circumstance of Cooteya Pillay being a parcener, would induce him to give partial evidence in favour of the Plaintiff? The contrary is the na-

tural inference; for there is ground to fear that he might be induced to give partial evidence against him, from motives of personal interest; for, if the Plaintiff be admitted to a share of the estate, Cooteya's must be proportionably reduced. Neither in law, therefore, nor reason, are there any grounds for rejecting his evidence. E.

ZILLA OF VERDACHELLUM.

C. Sashiah, *v.* P. Veneata Soobyah.

Veneata Lachemy Honmall, a witness on the part of the Defendant, (a Brahminy woman,) having lost her husband about a year ago, has since got her head shaved; upon which it is objected, that she cannot appear before the Court.—Qu. Is this so?

Answer.

According to the custom of the country, the woman in question cannot appear before the Court to give evidence.

Remark.

The appearance of the woman, under the circumstances stated, would not, according to the custom of the country, be decent. But why not depute an agent to examine her, as allowed in such cases by the regulations?

E.

ZILLA OF BELLARI.

April 7, 1810.

Gheriuppah, *v.* Sasachallum.

To the Pandit.

The point at issue in this case being involved in great obscurity, you are directed to say whether, in such a case, the Shaster authorizes the judge to administer an oath to the parties for the discovery of the fact; and what is the most solemn form of administering it to these parties, who are of the goldsmith caste.

Answer.

The judge has a discretion in such a case; and the goldsmiths being descended from *Visvakurma,* oaths must be administered to them in the presence of the goddess *Cali.* They are taken by them fasting, having a red cloth, wetted, thrown over them, with a vermilion mark on their forehead, and a wreath of flowers round their necks: at the same time extinguishing the light, which is kept burning in the Pagoda.

(Signed) RUNGACHARY, *Pandit.*

Remarks.

The answer seems to allow too great a latitude for administering an oath to a party, which, in fact, is ordeal. Catyayana says, "Supernatural proof is not required, if "witnesses be forthcoming; nor shall trial by ordeal, nor

" by oral evidence take place, in cases where written docu-
" ments exist. But, when the evidence of witnesses is
" equally balanced, let the truth be cleared by (oath or)
" ordeal."—Vyasa also declares, " Ordeal, though ad-
" ministered in due form, may contradict the truth
" through the power of charms, incantations, and drugs:
" not so an honest witness."

The author of the *Virametrodaga*, following the Mitacshara, observes, that " Oaths, as ascertaining the fact " only upon failure of human means of proof, fall within " the definition of ordeal; but are discriminated, because " the instantaneous ascertainment of the truth constitutes " ordeal; whereas oaths are the means of discovering it " by an event subsequent."—Nareda (i. v. 103.) authorizes this recourse, only in default of all other means of determining the fact. " If presumptive evidence be " insufficient, let the judge make the accused undergo " an oath administered on fire, or on water, or on the " merits of good actions, or in some other mode, accord-" ing to the value in dispute, the time, or season, and the " strength of the party." See also a material passage of Menu, ch. viii. v. 109. C.

Oaths may no doubt be legally administered to either party in a suit, but not to both, as the Judge's reference seems to imply. The opinion is correct. E.

ZILLA OF VERDACHELLUM.

January 23, 1807.

Of the three sons of the deceased, the two younger who were absent from home at his death, returning a few years after, and demanding a division of the estate, the elder denies being in possession of any; upon which this suit is instituted.—What evidence, according to the Hindu law, is required to prove the estate of the deceased to be in the hands of the elder brother?

Answer.

In the thirteenth division of the Smriti Chandrica, called *Daya bhagum*, it is held that when a concealment, such as is implied in the case, exists, the test of a solemn oath from the party is to be resorted to, by means of holy water, called *cosha*.

Remarks.

The passage to which reference is here made, contains a quotation from Catyayana, which occurs in Jagannatha's Digest, (book v. ver. 374.) and a correspondent text of Vrihaspati. C.

The administration of an oath would be proper, but whether it ought to be the *cosha*, or the *visha pramanam*, or any other, it may be questioned if the Pandit referred to was competent to determine. E.

ZILLA OF VERDACHELLUM.

June 18, 1807.

Tondavaroyall, *v.* Veneatanarnian.

The Plaintiff, alleging that he had deposited his paddy (rice) in the house of Patchia Gounden, and that the Defendant had taken and disposed of it, produces Patchia Gounden as a witness. It is objected, that Patchia Gounden has been at variance with the Defendant for these fourteen years, having filed no fewer than four plaints in this Court against him. It is objected to the production by him of another witness, named Santa Pillay, that he was removed from his situation of accountant, upon the Defendant discovering to the Honourable Company his fraudulent conduct toward them; and, of course, that he must be prejudiced. And to a third, named Tondavaroy Moodely, both partiality and prejudice are objected. It is referred to you, the Pandit, to say, how far such witnesses are admissible.

Answer.

The seizure and disposal of the paddy having been by force, if the witnesses in question are the only ones to be had, their evidence may be taken, otherwise they are inadmissible.

(Signed)

Remarks.

A professed enemy is no witness. Nareda, l. 5. 39. Menu, ch. viii. 64. No more is a known offender, *ibid.* According to Catyayana, they who subsist by the earnings of the party, or perform service for him, or are his kinsmen, or his intimate friends, or partisans, are not in general admissible as witnesses in his cause. Neverthe less, it is laid down by Menu, (ch. viii. v. 72.) that, in cases of violence, the judge must not examine too strictly the competence of witnesses. C.

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